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Canada. ¹⁸⁰ Communications dept.

Studies
Telecommission Study 1(a)



AN ANALYSIS OF THE
CONSTITUTIONAL AND LEGAL BASIS FOR THE
REGULATION OF TELECOMMUNICATIONS IN CANADA



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This Report was prepared for the Department of Communications by a project team made up of representatives from various organizations and does not necessarily represent the views of the Department or of the federal Government, and no commitment for future action should be inferred from the recommendations of the participants.

This Report is to be considered as a background working paper and no effort has been made to edit it for uniformity of terminology with other studies.

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TERMS OF REFERENCE

1 (a) An Analysis of the constitutional and legal basis for the regulation of Telecommunications in Canada.

Introduction:

1. Nature of the Study.
2. Its object and scope.
3. Summary

PART I: Constitutional Aspects.

- Ch.1: Principles of interpretation
Ch.2: Validity of legislation

PART II: Principles set by Jurisprudence

Section 1: Works and undertakings:

- A. extending to more than one province
- B. declared to be for the general advantage of Canada
- C. of a local nature.

Section 2: Power to Incorporate:

- A. federal
- B. provincial

Section 3: Other Powers:

- A. Peace, order and good government
- B. Local matters

PART III: Applications of Constitutional and Legal Principles to Telecommunications Services in Canada.

Introduction: Definitions

Ch.1: Telephone Services

- A. Description
- B. Regulatory powers

TERMS OF REFERENCE, cont'd

Ch.2: Telegraph Services

- A. Description
- B. Regulatory powers

Ch.3: Broadcasting

- A. Description
- B. Regulatory powers

Ch.4: Information Services

- A. Description
- B. Regulatory powers

PART IV: Present Federal and Provincial Legislation.

PART V: Concept of Telecommunications.

*
INTRODUCTION

General

This study deals with constitutional questions relating to telecommunications in Canada. It attempts to ascertain the division of constitutional powers between the federal Parliament and the provincial legislatures in relation to various telecommunications services. It also takes note of the powers actually exercised by the different federal and provincial authorities.

Beyond this, however, it does not go. It leaves it to others to deal with the question of whether there might be alterations in the status quo; and it makes no recommendations either with respect to revising the constitution, changing particular laws or affecting communications policy.

It is important nonetheless to emphasize that the study in no way represents a government or a departmental view - either officially or unofficially. The study team was composed of academics, telecommunications industry representatives and government officials and the study represents their own views. The Trans-Canada Telephone System, the Canadian Association of Broadcasters, C.N./C.P. Telecommunications and the Quebec Telephone Co. represented the industry, and briefs were submitted by the first two. The views contained in the Canadian Association of Broadcasters' submission represented a consensus within the group; and their study on radio and television was accordingly integrated into this report as Chapter II.

*Footnotes for Introduction and Chapters 1 and 2 can be found on Pages 42, 43 and 44.

As regards telephones, it was not possible for the group to reach agreement on the conclusions to the brief submitted by the Trans-Canada Telephone System. Accordingly, the text of this submission is printed in full as Appendix 3 to this report, with an alternative brief presented as Appendix 4.

Constitutional Principles and Secondary Sources

The study group considered that there were three heads of jurisdiction in sections 91 and 92 of the B.N.A. Act which were most important in relation to telecommunications.

The first is section 92(10)(a), which excepts from the exclusive provincial jurisdiction over "Local Works and Undertakings",

"Lines of Steam and other Ships, Railways, Canals, Telegraphs and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province".

The second head is 92(10)(c) which excepts from provincial jurisdiction,

"Such works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the General Advantage of Canada or for the advantage of two or more of the Provinces".

The effect of section 91(29) is to bring the exceptions in both ss. 92(10)(a) and (c) within exclusive federal jurisdiction.

The third head of jurisdiction lies in the introductory paragraph to section 91 which provides that,

"It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order

and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

In its study of each of the above heads and of the constitutional principles derived from them, the group found the following three works most useful:

- McNairn, Colin H., "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction", (1969) XLVII Canadian Bar Review 355.
- Lajoie, Andrée, Le Pouvoir Déclaratoire du Parlement, Montréal (1969), Les Presses de l'Université de Montréal.
- Laskin, Bora, Canadian Constitutional Law, 3rd edition, (Revised), Toronto, 1969, The Carswell Company Ltd.

In the three following chapters, the attempt has been made to apply the constitutional provisions, in the light of the principles of their interpretation developed through a century of court decisions, to the areas of telephony, radio and computer-communications respectively. The contribution of the above three works to this task, through their lucid and clear expositions of the relevant constitutional principles, should appear evident.

Application of Constitutional Principles to Telecommunication Services in Canada

Telephony

The services offered by telephone companies are now many and varied,¹ but they all have one thing in common: they provide facilities for communications between two given points.

With respect to the division of constitutional jurisdiction over telephony, and in particular over the services offered by telephone companies, the study team was unable to reach a consensus.

The disagreement turned essentially (but not only) on the question of whether Parliament or the provincial legislatures had jurisdiction to regulate the rates for interprovincial telephone calls (a) between points served by companies operating solely within particular provinces and regulated by provincial authorities and (b) between points served by these and other points served by federally-regulated carriers.

The view in the Trans-Canada Telephone System brief² was that inter-provincial telephone rates offered by any company were subject to the particular authority - federal or provincial - that regulated the company in all its services..

An alternative view of certain members of the group, presented in Appendix 4 below, was that interprovincial rates are matters of exclusive federal jurisdiction and that in fact all the major telephone companies in Canada are entirely subject to federal jurisdiction in all their services.

A third "middle" view was that while intra-provincial services of a carrier were subject to provincial jurisdiction, interprovincial services were a matter for exclusive federal jurisdiction.

Radio and Television:

Submission by the Canadian Association

Of Broadcasters.

The scope of this review of the constitutional and legal basis for the regulation of telecommunications in Canada is limited to "broadcasting" as defined by Section 2 of the Broadcasting Act, R.S.C. 1970 c. B-11, and only parenthetically relates to other modes of telecommunications in Canada.

Historical Context

The earliest form of telecommunication, telegraph, was the subject of pre-confederation legislation in Upper and Lower Canada.³ The first international convention covering telegraph was made in 1864 and included the British colonies in Canada by reference.

Confederation raised the matter of jurisdiction over telegraphs within the concept of the proposed union, and the division of powers between the federal government and the provinces. The issue was resolved in favour of exclusive federal jurisdiction,

at least to the extent that telegraph was an interprovincial undertaking, B.N.A. Act S.92 (10) (a), or was declared to be for the general advantage of Canada or two or more of the provinces, S92 (10) (c), or might be seen to relate to the peace, order and good government of the body politic, S. 91.

It is interesting to note that "telegraph" as appearing in Section 92 (10) (a) of the B.N.A. Act was included among those matters reserved by Resolution 29 (10), and thereafter included among the London Resolutions of 1866 as Resolution 28(8), leading one to the natural conclusion that the Fathers' of Confederation had no doubt but that national communication was of such importance that its control by the senior government was essential. Lord Carnarvon in introducing the bill respecting the B.N.A. Act in the House of Lords in 1867 said when explaining the proposed division of powers:

"Public Works fall into two classes: first those which are purely local, such as roads and bridges and municipal buildings-- and these belong, not only as a matter of right but also as a matter of duty, to the local authorities. Secondly, there are public works which, though possibly situated in a single Province, such as telegraphs, canals and railways, are yet of common import and value to the entire Confederation, and over these it is clearly

right that the Central Government should exercise a controlling authority".*

It follows that where telegraph or telecommunications might be found to relate only to an intraprovincial undertaking jurisdiction lay with the provinces under Section 92 as a "local work and undertaking" or Section 6, being "Generally all matters of a merely local or private nature in the Province", but where it was found to be otherwise, it was to be subject to the jurisdiction of Parliament under Section 92(10) (c) or Section 91. We shall see that the latter proved to be the case as regards broadcasting.

Avoiding the vexing challenge of choosing an appropriate spokesman from whom one might quote a succinct statement rationalizing this approach to the earliest of telecommunications in Canada, it need only be observed that national telecommunications like national transportation was seen to be essential to the maintenance and growth of the new country. What was happening in 1867 was not the confederating of a group of autonomous sovereign states, but the making of one sovereign nation with a federal system of government where the senior government had the preponderence of power and responsibility. This responsibility was not only to make the initial union work, but to expand it to incorporate into its sovereignty the balance of the colonial territory. (Annex "A" dates of union of provinces).

It would be ascribing to the Fathers of Confederation and the law officers at Westminster a clairvoyance beyond their recorded talents to have had them foresee the evolution of telecommunications from the rudimentary telegraph of the 1860's to telephone, radio, television, microwave and the satellite. It is fair to observe, however, that jurisdiction over a national transportation and communication system was seen to be an essential and fundamental requirement of the federal government.

Thus, we begin at the beginning with the B.N.A. Act, and example the process by which the interpretation of the basis and scope of federal jurisdiction over telecommunications has evolved.

Lord Hobhouse observed in Bank of Toronto v. Lambe:

"Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies...."⁵

And, Earl Loreburn L.C. in A.G. for Ontario v. A.G. for Canada

"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statue itself.... For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act".⁶

The law lords were perhaps unnecessarily generous in implying that the B.N.A. Act provided for total sovereign legislative authority. This Valhalla had to await the Statute of Westminster in 1931, leaving unresolved to date the power to amend the Constitution. On the other hand, Earl Loreburn gave to that Act its most fundamental character when he described it as:

"... a written organic instrument.."⁷

This concept of giving to the B.N.A. Act, a statutory enactment of the British Parliament, the vitality of growth, reflects its unique character as the primary constitutional expression of a country. Lord Sankey L.C. in Henrietta Muir Edwards v. A.G. for Canada in a judgment possibly more famous for having elevated women to the status of "persons" said:

"The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits". "Their Lordships do not conceive it to be the duty of this Board.....to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation....."⁸

It is in the foregoing context, of virtually total embodiment of legislative sovereignty, and an evolutionary relationship

between the nation and its constitution, that the Act must be viewed.

Section 91 and 92 (10) (a)

The initial interpretation of the Act respecting jurisdiction over telecommunications fell to the Privy Council in Toronto v. Bell Telephone Co.⁹ The question to be resolved was, in essence, did the Bell, a company incorporated by an Act of Parliament with power to extend its communication facilities across Canada, require the consent of the City of Toronto, a municipal corporation and a creature of the Province, to establish its lines along city streets.

Lord Macnaghten, after summarizing the facts said:

"The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of "local works and undertakings" assigned to provincial legislatures "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province": Section 92, Sub-section 10 (a). Section 91 confers on the Parliament of

Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company the objects of which as defined by its Act of incorporation contemplate extension beyond the limits of one province is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Company acquired from the Legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada".¹⁰

His Lordship went on to find that the fact of the company having as yet made no physical interprovincial connections in its system did not alter the fact that its act of incorporation authorized such an undertaking. Quoting from the judgment of Moss C.J.O.,

"...the question of the legislative jurisdiction must be judged of by the terms of the enactment (i.e., the Bell's Act), and not what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by

the legislative authority affords no ground for questioning the original jurisdiction".

Still a further issue resolved by the Board concerned the proposition that the business of the Company could be divided into two distinct parts, a long distance business falling under federal jurisdiction, and a local business falling under provincial jurisdiction. To this proposition, His Lordship replied:

"The undertaking, authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places."¹¹

Thus, in this first of what may be called the telecommunications' cases, we have:

- (1) A company authorized by the Parliament of Canada to carry on an interprovincial undertaking,

- (2) Of a type by analogy similar to telegraph, as,
- (3) Contemplated in Section 92(10) (a), i.e. "connecting the province with any other or others of the provinces or extending beyond the limits of the province" :and,
- (4) Indivisible into parts so as to divide jurisdiction and potentially frustrate the total undertaking.

In this latter connection it is interesting to consider the decision of the Privy Council in C.P.R. v. A.G. of B.C.¹² which drew a distinction between various operating divisions of the same company and held that in terms of jurisdiction, the parts were divisible without impairing the basic extra-provincial railway undertaking. No such approach has been taken with broadcasting. We shall note a confirmation of this argument against divisibility subsequently in the more recent case of Public Utility Commission v. Victoria Cablevision et al.¹³

Broadcasting

The next and indeed most significant decision in the field of broadcasting was that rendered by the Judicial Committee in In Regulation and Control of Radio Communication in Canada.¹⁴

This decision was delivered some three months after the Committee's decision in In Re Regulation and Control of Aeronautics in Canada.¹⁵

Section 91

It is useful to review the reasons for judgment in this latter case before proceeding to examine the Reference re Radio since the decisions in both cases placed jurisdiction fully and exclusively in the ambit of the federal government. By 1909 John McCurdy had piloted Alexander Graham Bell's flying machine on its first successful flight, i.e. it landed with the machine and McCurdy in the same condition as when they took off. The war of 1914-18 saw aeroplanes used as an accepted military weapon and the age of aeronautics was one including communications, landing rights, safety, licensing and the orderly use of flight paths. In 1919 Canada was a signatory to a convention relating to the international regulation of aerial navigation, and as a consequence thereof Parliament passed what was shortly to be known as the Aeronautics Act, R.S.C. 1927, c. 43 to regulate aeronautics throughout the Dominion. The Privy Council was asked in effect whether Parliament had exclusive jurisdiction in the matter.

Lord Sankey L.C. answered the question succinctly in the affirmative, and then proceeded to give his reasons. In so

doing he began by observing how difficult the task of determining such questions was and said:

"Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed". And later, "But while the Courts should be jealous in upholding the charter of the Provinces as enacted in S. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole". And still further at page 72: "But great caution must be observed in distinguishing between that which is local and provincial, and therefore, within jurisdiction of

the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada." His Lordship said at page 73: "There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of Section 91 and 92, but by reason of the plain terms of Section 132, where Canada, as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation."¹⁶

His Lordship went on to hold that Canada having sovereignty over its airspace had the power to enter into the Convention, and that the carrying out of the sweeping responsibilities under the Convention required Dominion legislation.

"Lord Sankey concluded by saying:

"As to that small portion of jurisdiction which is in doubt it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the

fulfillment of Canadian obligations under Section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.¹⁷

Thus, we have an extension of exclusive federal control into an area totally beyond the contemplation of the authors of the B.N.A. Act, but resting on a broad interpretation of this living constitutional statute and the responsibility of the central government in matters effecting the Dominion as a whole.

Section 92(10) (a)

So to the Radio Reference case of 1932. It was a long way from the telegraph of the 1860's. By the 1930's radio was information, entertainment and communication, and its potential and influence on the body politic limited only by yesterday's technology.

In 1927 Canada along with some eight other countries entered into the International Radio Telegraph Convention to ensure the orderly use and development of this new mode of communication. Still a further treaty followed in 1929, as did the Radio-telegraph Act, (R.S.C. 1927, c. 195) together with regulations made thereunder.

The question before the Privy Council was simply, had the Parliament of Canada exclusive power to control and regulate radio communication. Judgment for the Committee was delivered by Viscount Dunedin. He first applied the same reasoning as that employed in the Reference re Aeronautics (supra) as regards the convention, holding that only Canada as a Dominion could on behalf of its citizens enter into such a convention; and having done so said:

"It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada."¹⁸

His Lordship further held that the scope of the matters considered by the radio convention, like the aeronautics convention was so broad as to leave nothing upon which the provinces might legislate. Then dealing with the argument of the provinces that the substance of radio broadcasting could be divided into two parts, transmitting and receiving, with the former of federal jurisdiction, involving as it does wave lengths and the latter provincial jurisdiction under Section 92(13), Viscount Dunedin said:

"Their Lordships draw special attention to the provisions of head 10 of Section 92... Now, does broadcasting fall within the excepted matters? Their Lordships are of opinion that it does, falling in (a) within both the words "telegraphs" and the general words "undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province." The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the Convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts each independent of the other."¹⁹

Later still in the judgment their Lordships had reference to the judgment of Lord Macnaghten in the Bell case (*supra*) as to making a division of the undertaking.

"Consequently the words of Lord Macnaghten do carry a lesson as to the futility of trying to split what really is one undertaking into two."²⁰

After referring to the judgment of Lord Atkinson in the City of Montreal v. Montreal Street Ry. Co.²¹ the Privy Council held:

"Their Lordships have therefore no doubt that the undertaking" of broadcasting is an undertaking "connecting the Province with other Provinces and extending beyond the limits of the Province". But further, as already said, they think broadcasting falls within the description of "telegraphs." No doubt in everyday speech telegraph is almost exclusively used to denote the electrical instrument which by means of a wire connecting that instrument with another instrument makes it possible to communicate signals or words of any kind. But the original meaning of the word Telegraph, as given in the Oxford Dictionary is: "An apparatus for transmitting messages to a distance, usually by signs of some kind." Now a message to be transmitted must have a recipient as well as a transmitter. The message may fall on deaf ears, but at least it falls on ears. Further, the strict reading of the word "telegraph", making it identical with the ordinary use of it, has

already been given up in Corporation of the City of Toronto v. Bell Telephone Company of Canada".²²

The decision of the Privy Council in this Reference concludes with what can only be described as a prophetic comprehension of the complexities of telecommunications:

"Although the question had obviously to be decided on the terms of the statute, it is a matter of congratulation that the result arrived at seems consonant with common sense. A divided control between transmitter and receiver could only lead to confusion and inefficiency."²³

Thus, the exclusive jurisdiction of the federal government over radio communication rests on a solid foundation of statutory expression and judicial interpretation which saw the Act as maturing in scope and substance as the nation it defined developed.

Following from the foregoing decision Parliament has proceeded to legislate on matters affecting radio and television, from licensing of equipment to programming. (Annex "B", history of broadcasting legislation).

No further fundamental constitutional issues directly affecting radio or television have been before the courts. Radio and

television stations have been established across the country in the vast majority of cases under provincial incorporation, but always subject to licensing and regulating by federal authorities. Laterly, cable television has emerged as a natural technical extension of conventional television, with considerable debate surrounding jurisdiction. The two most prominent decisions in this connection are:

Re: Public Utilities Commission v, Victoria Cablevision et al²⁴: and

Re: Oshawa Cable T.V. Ltd. v. Town of Whiitby²⁵

In the former case the question of jurisdiction arose as a result of the B.C. Public Utilities Commission attempt to make the cable companies subject to their jurisdiction, and if not the whole undertaking then that portion of the operation leading from the antenna to the customers.

Sheppard, J.A. said:

"The receiving of the programs by air (at the antenna) is beyond doubt within the exclusive jurisdiction of the Dominion."²⁶

In this context he quoted the words of Viscount Dunedin from page 85 of In Regulation and Control of Radio Communications (supra),

to the effect that "broadcasting" falls within the words "telegraphs" and "undertakings connecting the Province etc."

As to severability, His Lordship said, "The facts do not support that contention (of severability). The respondents are licensed by the Dominion as land service stations. The reasons for the antennae and their operation by the respondents is to pick up and convey for reward programs to subscribers who otherwise would receive them imperfectly or not at all. The rental is the payment for the program, that is, for its receipt by the antennae and its transmission to the customer, and not merely for the transmission by cable; the cable merely extends the effective range for transmitting the programs received by the antennae.

It follows that the cable and the rentals are an integral part of the undertaking controlled by the Dominion through the Department of Transport."²⁷

Finally applying an argument that was used by the Court in A.C. Ont et al v. Winner, Winner et al v. S.M.T. (Eastern) Ltd. he said:

"If the cables and rentals paid by the customers were subject to Provincial legislation, then the Legislature could restrict the rights conferred by the Dominion.....

Such Sections (sections of the Public Utilities Act) even if applied to cables and rentals only, must operate upon the antennae to such an extent as to invoke the comments of Lord Porter (in the Winner case) "But can you emasculate the actual undertaking and yet leave it the same undertaking." In other words, if the Provincial Legislature purport to operate on the cables and rentals, nevertheless it must affect the operation of the antennae so as to entrench upon Section 92(10) (a), and therefore to enact that which is ultra vires of the Province and within the exclusive legislative jurisdiction of the Dominion."²⁸

The last case, namely Re Oshawa Cable T.V. Ltd. v. Town of Whitby²⁹ was not unlike the earlier Bell case for the Town of Whitby purported to exercise control over the running of the C.A.T.V. cable along the town streets by virtue of power given to it under the Municipal Act, R.S.O. 1960, C. 249.

Stark, J. in rendering his decision had no hesitation in holding that the Town misinterpreted the extent of powers granted by the Municipal Act, and that therefore its by-law was ultra vires the powers of the municipality. Having so found His Lordship went on to say that, had such power been purportedly given by the Municipal Act, he would have held the appropriate Section of the Act ultra vires the province as encroaching upon an area of exclusive federal jurisdiction, namely broadcasting.

Scope of Federal Jurisdiction

Before concluding this review of the constitutional and legal basis of federal jurisdiction over broadcasting, it is important to touch on one final area, namely the scope of Parliament's jurisdiction arising out of its exclusive legislative competence.

Some guidance in this area may be obtained by reference to the case of Johannesson v. The Rural Municipality of West St. Paul and A.G. for Man. and A.G. for Canada.³⁰

The appellant in this case, having been engaged in commercial aviation for many years in Manitoba, and holding an air transport licence from the Air Transport Board was required for various reasons to acquire a new airport site for his local charter service. After a lengthy search, a suitable site was found. The Rural Municipality acting under authority conferred upon it by the Municipal Act of Manitoba, passed a by-law which in effect prohibited the establishment of the proposed airport by the appellant.

The appellant brought an action to have the by-law and relevant section of the Municipal Act declared ultra vires.

In allowing Johannesson's appeal Kerwin J. said:

"Section 921 of the Municipal Act does not confer powers to provide generally for zoning, or for building restrictions; the powers are specifically allotted with reference to aerodromes or any places where aeroplanes are kept for hire or gain. The by-law follows the section so that, if the latter is ultra vires the Provincial Legislature, the former cannot be upheld."³¹

Referring to the decision of the Privy Council in the Aeronautics case (1932) A.C. 54 he added:

"If, therefore, the subject of Aeronautics goes beyond local or provincial concern because it has attained such dimensions as to affect the body politic of Canada, it falls under the "Peace Order and Good Government" clause of s.91 of the B.N.A. Act since aeronautics is not a subject matter confined to the provinces by s. 92" "Now even at the date of the Aeronautics case, the Judicial Committee was influenced by the fact that in their opinion the subject of air navigation was a matter of national interest and importance and had attained such dimensions."³²

He also referred to A.G. for Canada v. Canada Temperance Federation (1946) A.C. 193 and after quoting Viscount Simon observed that:

"In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specifically reserved to the provincial legislatures."³³

Kellock J. in allowing the appeal said after referring both to Aeronautics case and the Radio case:

"In my opinion the subject of aerial navigation in Canada is a matter of national interest and importance and was so held in 1932." "It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be

divorced from the subject matter of aeronautics or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the province that Parliament may not have occupied the field."

"Once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive."³⁴

This led him to the following conclusion:

"In my opinion, just as it is impossible to separate intra-provincial flying from inter-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole. The provincial legislation here in question must be held, therefore, to be ultra vires, and the by-law falls with it."³⁵

Justice Estey further developed the position of the Court that the scheme of aeronautics is totally incapable of separation.

"The Judicial Committee having decided that legislation in relation to aeronautics is within the exclusive

jurisdiction of the Dominion, it follows that the province cannot legislate in relation thereto, whether the precise subject of the provincial legislation has, or has not already been covered by the Dominion legislation."

Indeed, in any practical consideration it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other." "Legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the large subject of aeronautics and is, therefore, beyond the competence of the Provincial Legislatures."³⁶

Thus, once it was established that the Dominion had exclusive jurisdiction with respect to aeronautics, the scope of such jurisdiction in all matters relating to aeronautics was complete and absolute. To hold otherwise, as Justice Locke noted would be to take a matter which concerns the country as a whole and potentially frustrate its accomplishment by the whim of a local municipality:

"It is an activity which....must from its inherent nature be a concern of the Dominion as a whole. The

field of legislation is not, in my opinion, capable of division in any practical way."³⁷

Throughout this case their Lordships, in holding that the Province could not legislate in a matter of exclusive jurisdiction of the Dominion, referred to both the Aeronautics and the Radio reference cases. In so doing they again re-emphasized that the subject matters of aeronautics and radio, having been found to be within the exclusive jurisdiction of Parliament as matters which concern the country as a whole, were absolute and indivisible as regards the federal government.

Thus, by analogy, radio and therefore broadcasting being a matter of exclusive jurisdiction as regards Parliament, Parliament's scope of jurisdiction is total and absolute in the field.

RADIO AND TELEVISION

Annex "A"

Chronology of Provincial Union

Canada (Upper & Lower)	1867
Prince Edward Island	1867
Nova Scotia	1867
New Brunswick	1867
North West Territories (Hudsons Bay Co. Lands)	1869
Manitoba	1870
British Columbia	1871
Alberta	1905
Saskatchewan	1905
Newfoundland	1949

RADIO AND TELEVISION

Annex "B"

History of Broadcasting Legislation

Radio Telegraph Act, C43 S. of C.	1913
Radio Telegraph Act, C. 195 R.S.C.	1927
Canadian Radio Broadcasting Act, C. 51, S. of C.	1932
Canadian Broadcasting Act, C. 24 S. of C.	1936
Radio Act, C. 50 S. of C. (now C. R-1 R.S.C.)	1938 1970
Broadcasting Act, C. 22 S. of C.	1958
Broadcasting Act, C. 25 S. of C.	1967-68
Telesat Canada Act C. 51 S. of C.	1968-69

Computer Utilities

To complete a study on constitutional jurisdiction in the broad matter of telecommunications, the subject of computers and communications should - even if briefly - be discussed. Until a few years ago, such a discussion would probably not have been considered relevant. Today it would be a serious omission to exclude it.

For one of the main features of the development of electronics technology in the sixties has been the increasingly interdependent development of the previously disparate technologies of computers and communications, to create an important new class of combined computer/communication systems, often called "computer utilities."³⁸ These systems employ a central computer, telecommunications links to remote access terminals in various locations, and a variety of equipment and time-sharing techniques, to make available to customers at these locations - usually in their own premises - a wide range of information and data-processing services.³⁹

These systems, in which terminals, telecommunications facilities and computer-data banks are fully integrated and interdependent, are coming to represent the optimal as well as the typical form of computer utilization; and "man-machine" communication is coming to represent a continually increasing percentage of the total number of telecommunications

transactions. "Computer utilities promise eventually to make the computer as much a part of everyday life as the telephone is today."⁴⁰

As has been mentioned before, reference in the B.N.A. Act to telecommunications is quite scanty. On the subjects of data-processing or computers, it is of course silent.

Let us examine, in order, computers, computer utilities and databanks, in an attempt to ascertain the relevant constitutional jurisdiction.

Where computers are installed in businesses or in homes (and with the rapid development of "minicomputers," this will become increasingly more frequent), it is not certain in what respects they should be regulated at all. Yet should a demand for their regulation arise, it is also uncertain under which jurisdiction - federal or provincial - they would fall. Probably the most one could say - and that primarily in the case of businesses - is that where they are owned or rented by particular corporations for use internally in their general operations, they would very likely be considered as part of the corporations' equipment and as such, subject to the jurisdiction of incorporation of the corporation itself or the jurisdiction where it carries on business.

In the case of computers employed wholly or partially for data-processing services available to the public at large, or specifically to other firms, the important question would be whether the operation was entirely intraprovincial or not. If the computer and the remote access terminals were located wholly within a particular province, then apart from any federal aspects that might be involved (see below), this operation would likely be subject to provincial regulation as a local work or undertaking, under section 92(10) of the B.N.A. Act.

With respect to comprehensive computer-communications systems, here the rules relating to the general subject of telecommunications would be applicable. Now it must of course be borne in mind that, as outlined in Section 1, there are two sets of rules in this regard which are somewhat divergent. One stems from the actual pattern of telecommunications regulation currently in operation in Canada. The other is derived more directly from the principles of the B.N.A. Act and of its interpretation by the courts. This Chapter, in line with the terms of reference of this telecommission study and for presentation purposes, though without wishing to ignore and without prejudice to the existing situation, employs the second set of rules derived from the constitution.

Thus, where the computer-communication system extended via its terminal wires beyond the limits of the province where the computer was located, where it connected two or more

provinces, or where it reached beyond the borders of Canada, federal jurisdiction would be invoked. Man-machine communications would in this sense be seen as not raising any qualitatively different jurisdictional questions from man-man communications.

The unity of the undertaking is in fact its paramount feature. The optimum design of a computer utility demands a "systems approach" in which the emphasis is on the integration of function (such as information transfer, storage, message switching, etc.) rather than on an arbitrary division into data-processing and communications segments.⁴¹ Canadian communications jurisprudence, sparse as it is, has from the Bell-Toronto (1905) to the Victoria Cablevision (1966) cases, tended in related areas, to stress the concept of the unity of the undertaking in relation to constitutional jurisdiction. It is not unreasonable to suppose that it would take a "systems" approach here as well, rather than attempt to artificially separate out the computer from its telecommunications arteries.

Broadly speaking, as has been outlined in Part I, federal jurisdiction would thus arise from Section 92(10)(a), which excepts from provincial jurisdiction "telegraphs" and other works and undertakings extending beyond the limits of a province or connecting more than one province. By virtue of Section 91(29), classes of subjects expressly excepted from provincial jurisdiction are assigned to the federal Parliament.

A second general basis for federal jurisdiction might be provided by the opening paragraph of Section 91 of the B.N.A. Act where the federal Parliament has the exclusive authority to make laws for the "peace, order and good government" of Canada. Inter alia, the courts have developed a theory of interpretation whereby when a matter is deemed to be of "national dimensions" it is valid for the federal Parliament to make laws with respect to it for the "peace, order and good government" of the country. Any remote access computer system of national scope might thus become subject to federal regulation under this rule.

A third basis for federal jurisdiction would lie in Section 92(10) (c), whereby certain works (of any type), although wholly situated within a province, may be declared by Parliament to be for the general advantage of Canada or two or more of the provinces. (The works of Bell Canada and of B.C. Tel. have been so declared). This power has, however, not been employed in recent years.

Professor J.M. Sharp suggests, albeit conjecturally, that federal jurisdiction might also be assumed under Section 91(2) of the B.N.A. Act, the Trade and Commerce power, in virtue of the "stream of commerce" doctrine.⁴² Quoting the classic statement of this doctrine in the Reference Re The Farm Products Marketing Act, he suggests that if the U.S. example were to be followed (something he considers feasible, though questionable and unlikely), then where the data computed and stored entered

"into the flow of interprovincial or external trade", federal jurisdiction could arise. Professor Sharp has in mind a situation where the operation is itself interprovincial or international, but even where it is intraprovincial, to the extent that the intraprovincially stored and computed data continues on by other means into the interprovincial commerce flow, federal authority might apply. One major problem with this approach would be determining whether and at what point the data actually enters the commercial flow and where the flow ceases. Such determination would be even more difficult and perhaps more arbitrary than the problem mentioned earlier of separating the computer from its telecommunications arteries.

Beyond and irrespective of the general jurisdiction over the utility, however, there are still aspects of it which are exclusively within federal or provincial jurisdiction in either case.

Thus, if radio communication is employed in the transmission of the data, then it is necessary to obtain a federal radio licence. And as regards particular installations, these would remain subject to provincial property laws. The criminal law, and hence federal jurisdiction, might also be relevant in certain cases in order to prohibit and impose criminal sanctions against particular uses and abuses of computer facilities. And still another federal "aspect" would be that of national security, where federal authority would be applicable

in regard even to intraprovincial systems to provide, for instance, for measures to ensure the secrecy and retention in Canada of data considered vital to national security.

Data banks represent storehouses of detailed information of all types about a wide range of subjects. While they do not perform qualitatively new functions, their revolutionary qualities lie in the fact that they centralize great quantities of data, retain them infallibly and make them instantly available. They could well give rise to the need for regulation. Suggestions in this regard have pertained to the licensing of the bank itself, to the manner in which the data is gathered, the nature of the data stored, the conditions under which it is to be made available, the persons with access to the data, the rights of people in the information stored and given out about them, and so forth. Regulation in turn raises the question of constitutional jurisdiction.

In nearly all cases, a data bank will be part of a remote access computer system, and as such subject to federal or provincial jurisdiction as is the computer-communication system itself. In the unlikely case that it is an "unconnected" data bank, the aspects of it made subject to regulation would likely determine the regime. (These aspects would be subject to the exclusive jurisdiction of either the federal or the provincial authority even in the case of "connected" data banks). In the matter of proprietary rights, for example, copyright and patents

in respect of the data would be federal matters. So would such matters as the sale of certain sensitive types of information to foreign entities.

In the matter of privacy, there might be both federal and provincial aspects. Rights which the law might confer to verify and amend information, for example, and techniques of legal protection against invasion of privacy in general could be enforced through the criminal law and/or through the provincial laws of contract and tort.

Professor Sharp suggests that "perhaps a rather loose analogy could be drawn from the inter-relation of the federal Narcotic Control Act and Food and Drugs Act on the one hand and the provincial Pharmaceutical Acts on the other hand. To some extent these are complementary; there is no reason why an inter-locking system of federal-provincial legislation should not be evolved to deal with data banks and the information they store".⁴³ Despite the organizational and related problems associated with a cumbersome inter-locking regime - including the possibility of deviations and of lack of uniformity among the enactments of the various provinces - privacy would appear to be an excellent prospective area for federal-provincial co-operation in regulating a matter of joint and increasing concern.

FOOTNOTES

1. See, for example, the Bell Canada charter which empowers that company, under s. 5(1) of the Bell Canada Act (c. 81, 1948) "to transmit, emit or receive and to provide services and facilities for the transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic systems and in connection therewith to build, establish, maintain and operate . . . all services and facilities expedient or useful for such purposes, using and adapting any improvement or invention or any other means of communicating".
2. See Appendix 3 below p. 33.
3. An Act respecting Electric Telegraph Companies c. LXVII, Cons. Stat. of Canada, 1859.
4. 1867, Debates of the House of Lords.
5. (1887) 12 A.C. 575 at 587.
6. (1912) A.C. 573 at 583.
7. Ibid p. 583.
8. (1930) A.C. 125 at 136.
9. (1905) A.C. 52.
10. Ibid p. 57.
11. Ibid p. 59.
12. (1950) A.C. 122.
13. (1965) 51 D.L.R. 2nd 716.
14. (1932) A.C. 304.
15. (1932) A.C. 54.

16. Ibid p. 70.
17. Ibid p. 77.
18. Radio Reference supra footnote 14 at p. 311 .
19. Ibid p. 314.
20. Ibid p. 316.
21. (1912) A.C. 333.
22. Radio Reference supra p. 315.
23. (1932) 2 D.L.R. 81 at 88.
24. (1965) 51 D.L.R. 2nd 716.
25. (1969) 2 O.R. 18.
26. Victoria Cablevision supra footnote (24) at p. 718.
27. Ibid p. 719.
28. (1954) 4 D.L.R. 657 at 719. (See also Campbell Bennett Ltd. v. Comstock (1954) 3 D.L.R. 481.
29. (1969) 2 O.R. 18.
30. (1952) 1 S.C.R. 292.
31. Ibid p. 305.
32. Ibid p. 307.
33. Ibid p. 308.
34. Ibid p. 311.
35. Ibid p. 314.
36. Ibid p. 318 et seq.
37. Ibid p. 327.

38. "Participation by Telecommunications Carriers in Public Data-Processing," DOC Document, 1970, p. 1.

39. Ibid.
40. Ibid.
41. Ibid., p. 3.
42. "Computers - Some Proposals for Legislation" by Professor J.M. Sharp, Position Paper Panel 6, Conference on Computers, Queen's University, May 21-4, 1970, p. 2.
43. Ibid., p. 6.

Appendix 1 1. Synopsis of Current Federal Telecommunications Legislation

Federal jurisdiction in the field of telecommunications is exercised under the following statutes; (all chapter and section references are to the Revised Statutes of Canada, 1970).

- a) the Radio Act, c. R-1
- b) the Railway Act, c. R-2
- c) the Telegraphs Act, c. T-3
- d) the Telesat Canada Act, c. T-4
- e) the Broadcasting Act, c. B-11
- f) the Canada Shipping Act, c. S-9
- g) the Canadian Overseas Telecommunications Corporation Act, c. C-11
- h) Special Acts of incorporation
- i) Department of Communications Act, R.S.C. 1970. c. C-24
- a) The Radio Act

In the Radio Act, "radiocommunication" or "radio" is defined as "any transmission, emission or reception of signs, signals, writing, images, sound or intelligence of any nature by means of electro-magnetic waves of frequencies below 3,000 gigacycles, propagated in space without artificial guide." (section 2. (1)).

Essentially this Act provides for the regulation and control of radiocommunication in Canada by requiring that any person who establishes a radio station other than a broadcasting station, or installs, operates or has in his possession a radio apparatus, shall do so only under and in accordance with a licence issued by the Minister of Communications. To the extent that radio stations or radio apparatus are part of a broadcasting undertaking, for which a licence is issued under the Broadcasting Act, the authorization of the Minister of Communications is required in the form of a technical construction and operating certificate. The Crown in right of Canada or any province is bound by the Act. (section 2(2)).

Provision is made for the Minister to grant exemptions under certain conditions from the licensing requirement, and from the requirement for a technical construction and operating certificate in respect of a broadcasting undertaking that is exempted from licensing under the Broadcasting Act. A statutory exemption from licensing is provided in respect of radio receiving apparatus intended only for the reception of broadcasting where such apparatus is not part of a broadcasting undertaking.

The Minister exercises a discretionary power in respect of the issue of licences and technical construction and operating certificates which may be issued for such terms and subject to such conditions as he considers appropriate for ensuring the

orderly development and operation of radiocommunication in Canada. While the Minister, in exercising this power has ordinarily taken into consideration technical matters relating to the efficient use of the radio spectrum he also takes into account economic and other considerations in granting or denying a licence. (section 4(1)(b)).

Apart from the authority to make regulations applying to radio stations generally, the Act makes it mandatory that the Minister shall regulate and control all technical matters relating to the planning for and construction and operation of broadcasting facilities used in carrying on a broadcasting undertaking which are licensed under the Broadcasting Act. This authority includes such matters as determining the power, radio frequency (channel) and call letters to be used by broadcasting transmitting undertaking, approval of the site upon which radio apparatus for broadcasting undertakings may be located, and prescribing technical requirements in respect of such radio apparatus. (section 5).

Authority is given to the Minister to make regulations in respect of such matters as, classifying radio stations, prescribing the type of radio apparatus that may be installed, the frequency and power to be used, the nature of the service to be rendered by radio stations, prescribing general conditions applicable to each class of licence or technical construction and operating certificate, and for carrying out and making effective

the terms of international agreements. Regulations may also be made prescribing classes of radio operators' certificates, examination requirements for such certificates, and prescribing watches to be kept by operators and the number of operators to be carried on radio stations. (section 7).

The Minister is responsible for securing the rights of Canada, by international regulation or otherwise, in telecommunication matters; and where the broadcasting is concerned, he must consult with the Canadian Radio-Television Commission. He is also required to undertake, sponsor, promote or assist in research relating to radiocommunication and encourage the development and more efficient operation of radiocommunication, for the purpose of improving the efficiency of radiocommunication services in the public interest. (section 8).

The Governor in Council is given the power to prescribe a tariff of fees for licences and for examination for radio operators' certificates. He may make regulations prohibiting or regulating the sale or use of equipment liable to cause radio interference, and the offering for sale of broadcasting receiving apparatus that does not comply with technical requirements established by the Minister. This latter provision had for its initial purpose, and has been so applied, to require television sets to be fitted for reception of U.H.F. as well as V.H.F. channels. The Governor in Council also may make regulations

respecting the qualifications of persons to whom licences may be issued or who may be employed as operators of radio stations, and for the censorship or controlling of radio messages in the cases of war or other emergency. (section 6).

Her Majesty may, at any time, take possession of any radio station and of all things necessary to the working of the station, and require the exclusive service of the operators and other persons employed in working the same. It is provided that where the Minister and the person owning or controlling the station cannot agree as to the compensation to be paid, the Minister shall refer the matter to the Exchequer Court (now the Federal Court) for adjudication. (section 12).

The Act prohibits any person from

- (a) knowingly transmitting or causing to be transmitted any false or fraudulent signal or message or interfering with or obstructing any radiocommunication; or
- (b) divulging or making use of a radiocommunication other than that transmitted by a broadcasting undertaking except as provided by regulation.

b) The Railway Act

Under this Act, the Minister of Communications has responsibilities in relation to telegraphs and telephones.

The Canadian Transport Commission, established under the National Transportation Act is given certain regulatory powers in respect of telegraphs and telephones.

The Commission has full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested complaining that any company or person has failed to do any act, matter or thing required to be done, or has done any act, matter or thing contrary to the Act, or the Special Act or any regulation, order, or direction or requesting the Commission to make any order, or give any direction, leave, sanction or approval it is authorized to make or give, or with respect to any matter, act or thing, that by the Act, or the Special Act, is prohibited, sanctioned or required to be done.

The Commission may order and require any company or person to do forthwith any act, matter or thing that such company or person is required to do under this Act, or the Special Act and may forbid the doing of any act, matter or thing contrary to this Act or the Special Act; and for the purposes of the Act the Commission has full jurisdiction to hear and determine all matters whether of law or of fact. The Commission in the

exercise or its jurisdiction, has all such powers, rights and privileges as are vested in a superior court.

The Commission may make orders and regulations

- a) with respect to any matter, act or thing that by this Act or the Special Act is sanctioned, required to be done, or prohibited;
- b) generally for carrying this Act into effect; and
- c) for exercising any jurisdiction conferred on the Commission by any other Act of the Parliament of Canada (for example, the Telegraphs Act).

Any such orders or regulations may be made to apply to all cases or to any particular case and the Commission may exempt any railway or works from the operation of any such order or regulation.

The Commission may of its own motion, or shall, upon the request of the Minister, inquire into, hear and determine any matter or thing that, under this Act, it may inquire into, hear or determine upon application or complaint. The Governor in Council may refer to the Commission for a report, or other action any question, matter or thing arising, or required to be done

under this Act or the Special Act, or any other Act of the Parliament of Canada.

The Commission may of its own motion, upon the application of any party, or at the request of the Governor in Council state a case in writing for the opinion of the Supreme Court of Canada upon a question that in the opinion of the Commission is a question of law or jurisdiction of the Commission.

The finding or determination of the Commission upon any question of fact within its jurisdiction is binding and conclusive.

Decisions and orders of the Commission may be made rules, orders or decrees, of the Exchequer Court (now the Federal Court), or of any superior court of any province and shall be enforced in like manner as any rule, order or decree of such court.

The following provisions are made for review or appeal from any order or decision of the Commission:

- a) the Commission may, review, rescind, change, alter or vary its orders or decisions or rehear any application before deciding it,

- b) the Governor in Council may vary or rescind any order, decision, rule or regulation of the Commission; and any order that the Governor in Council may make in respect thereto is binding upon the Commission and upon all parties,
- c) an appeal lies from the Commission to the Supreme Court of Canada, upon a question of law, or a question of jurisdiction upon leave therefor being obtained from a judge of the Supreme Court. The Court may draw all such inferences as are not inconsistent with the facts expressly found by the Commission, and are necessary for determining the question of jurisdiction or law. The Commission shall make an order in accordance with the opinion rendered by the Court.
- d) save as above, every decision or order of the Commission is final; and no order, decision or proceeding of the Commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari, or any other process or proceeding in any court.

The Commission may appoint or direct any person to make an inquiry and report upon any application, complaint or dispute pending before the Commission, or upon any matter or thing over which the Commission has jurisdiction under this Act or the Special Act.

The Minister may, with the approval of the Governor in Council appoint and direct any person to inquire into and report upon any matter or thing which the Minister is authorized to deal with under this Act or the Special Act.

This Act, in so far as it relates to telegraph and telephone, applies to

- a) railway companies within the legislative authority of the Parliament of Canada, authorized to construct and operate a telegraph or telephone system or line, and to charge telegraph and telephone tolls;

- b) telegraph and telephone companies within the legislative authority of the Parliament of Canada having power to construct or operate a telegraph or telephone system or line and to charge telegraph or telephone tolls.
(section 320).

In reference to paragraph a) above, the Act provides generally that a railway company may, as incidental to its undertaking, construct and operate telegraph and telephone lines upon its railway for the purpose of its undertaking; and such companies may enter into contracts with any other company having telegraph or telephone powers, for the purpose of exchanging and transmitting messages, or connecting its lines with the lines of

the other company or leasing its lines to the latter. (section 312).

In respect of railway companies, the Act further provides that where the Special Act provides for such companies to transmit telegraph and telephone messages for the public and collect tolls therefor, they may subject to the Act, construct and operate telegraph and telephone lines upon its railway, establish offices and collect tolls, and may enter into agreements with any companies having telegraph and telephone powers and connect its lines with the lines of, or lease its own lines to, any such company. (section 314).

The Act provides in respect of the telegraphic business of railway companies that Part II of the Telegraphs Act shall apply but notwithstanding anything in the Telegraphs Act, such company shall not construct or operate any line along any highway or public place without first obtaining the consent of the municipality having jurisdiction. (sections 314 and 315).

Any company empowered by Special Act or other authority of the Parliament of Canada to construct, operate and maintain telegraph and telephone lines may break up and open any highway, square or other public place subject to prescribed conditions. The Commission may determine the height at which such companies shall affix and maintain any wires. The consent of the municipality having jurisdiction shall be obtained for the

construction of any telegraph or telephone line upon, along, across or under any highway, square or public place. Where such consent of the municipality can not be obtained on terms satisfactory to the company, the latter may apply to the Commission to determine the question. The Commission may deny the application, change or fix the route of such lines and may by order impose such terms and conditions as it deems expedient under which the company may construct its lines.

The Commission has the authority to order that the company place its wires underground in any municipality, such order being made by the Commission jointly with a provincial commission, public utilities or other board having jurisdiction to make such an order in respect of a line within the legislative authority of the province.

Telegraph and telephone tolls to be charged by the company and all charges for leasing or using the telegraphs or telephones of the company are subject to the approval of the Commission and may be revised by the Commission. Recent amendments to the Act require Commission approval of charges for private wire services, including such services as teleprinter and data transmission.

The Company is required to file with the Commission the tariffs of tolls to be charged and the company shall not charge

any toll in respect of which there is default in such filing or which is disallowed by the Commission.

The Commission may, upon application, deal with questions of unreasonableness or unjust discrimination in respect of telephone tolls and where it considers tolls to be unreasonable or unjust may require the company to substitute tolls satisfactory to the Commission.

The Commission may order the company to permit another telephone system to use the company's telephone system by connecting the one telephone system with the other for the purpose of obtaining direct communication between telephones and telephone exchanges on the one system or line and telephones and telephone exchanges on the other system or line. Whether such connection or communication is provided for by agreement of the parties or by order of the Commission, the provisions of the Act with respect to joint tariffs shall apply.

All contracts, agreements and arrangements between the company and any other company, or any province, municipality or corporation having authority to construct and operate a telegraph or telephone system or line, for the interchange of traffic or for the division of tolls, are subject to the approval of the Commission, and shall be approved by the Commission before such contract, agreement or arrangement has any force or effect.

All telegraph and telephone tolls shall be just and reasonable and a company in respect of such tolls (or any services or facilities provided by the company as a telegraph or telephone company) shall not make any unjust discrimination make or give any undue or unreasonable preference or advantage to any particular person or description of traffic or subject any particular person or description of traffic to any undue or unreasonable prejudice or disadvantage. (section 321).

The Commission may determine as a question of fact whether the above requirements respecting tolls have been complied with and may suspend or disallow such tolls or any portion thereof or substitute a tariff satisfactory to the Commission in a case of non-compliance. (section 321).

The Commission has a general power to make orders with respect to all matters relating to traffic, tolls and tariffs. Traffic means the transmission of and other dealings with telegraphic and telephonic messages. (section 321).

The Governor in Council may require a railway, telegraph or telephone company to place at the exclusive use of the Government of Canada any electric telegraph and telephone lines and any apparatus and operators which it has; and such company is entitled to receive reasonable compensation for such services. (section 323).

Every railway, telegraph and telephone company shall submit annual returns, as required by the Commission of its assets, liabilities, capitalization, revenue, working expenditures and traffic. Accounts to be kept for this purpose shall be as prescribed by the Commission. (section 325).

The Commission may also require any railway, telegraph or telephone company to furnish written statements showing the assets and liabilities of the company, the amount of stock outstanding, the consideration received for such stock, gross earnings and expenditures and other information of a financial nature. (section 335).

c) The Telegraphs Act

This Act is divided into four Parts.

Under Part I, telegraph operators and other persons employed in connection with any telegraph line wholly or partly under the control of the Government of Canada where they may have the opportunity of becoming acquainted with information related to matters of State or any other information are required to subscribe to a Declaration of Secrecy in the form set out in the Schedule to the Act.

Part II of the Act, relating to land line telegraph, applies to telegraph companies incorporated under the federal Companies Act, now the Canada Corporations Act, and therefore would not ordinarily apply to railway, telegraph and telephone companies that are incorporated by Special Act of Parliament. However in the Railway Act, provision is made under which Part II of the Telegraphs Act, to the extent that it is not inconsistent with the provisions of the Railway Act, does apply to railway companies. It is also noted that the Canada Corporations Act, in section 5, specifically excludes the construction and working of telegraph lines from the objects and purposes of a company incorporated under that Act.

Authority is given under Part II for a company to construct lines of telegraph, authorized in its charter, upon

public roads and highways, or across or under navigable waters within Canada subject to provisions respecting the manner of construction.

Provision is made respecting the transmission of messages, requiring that the company shall transmit all messages in the order in which they are received but giving preference to government messages.

Her Majesty may assume possession of any telegraph line temporarily, or expropriate the line and all property thereof. Where a difference arises as to the compensation to be made provision is made for three arbitrators to be appointed and the award of any two arbitrators is final.

Part III of this Act deals with inter-provincial submarine cables. It applies to companies authorized to construct and maintain such submarine cables in waters that are within the jurisdiction of Canada.

Authority is granted to such a company to expropriate land for its purposes. Powers as to entry and acquisition of land is to be exercised under the provisions of the Railway Act for that purpose.

A company may exercise its powers only after its plans have been submitted to and approved by the Governor in Council.

The placement of any telegraphic wire, cable or work connected therewith in, under, upon, over, along or across any gulf, bay or branch of the sea, or any tidal water, or the shore or bed thereof respectively is subject to the consent of all persons having any right of property, or any power, jurisdiction or authority in, over or relating to the same, that may be affected or be liable to be affected by the exercise of powers of the company. (section 23).

For the purpose of the above-mentioned provision of section 23, provisions are made in sections 24 to 29 under which such construction is subject to the approval of the Minister of Communications.

Provisions are included respecting the transmission of messages, and the approval of the Canadian Transport Commission is required for the rates to be charged by the company. As in Part II, messages are required to be transmitted in the order in which they are received but preference shall be given to government messages. (sections 31-34).

Companies incorporated under the law of Great Britain to establish and maintain telegraphic communication in, upon, under or across any gulf, bay or branch of any sea or tidal water within the jurisdiction of Canada, may obtain a Canadian charter by letters patent granted by the Governor in Council. The granting of such a charter to a company having an exclusive

privilege in respect of cable landings is subject to reciprocity being granted to any and each of the companies to which Part III. of the Act applies.

Part IV of the Act provides for the licensing of external submarine cables. External submarine cable is defined as a telecommunication service by submarine cable between any place in Canada and any place outside Canada or between places outside Canada through Canada, but does not include any service by a submarine cable wholly under fresh water; and the expression "telecommunication" has the same meaning as it has in the Radio Act. Telecommunication as defined in the Radio Act, means any transmission, emission or reception of signs, signals, writing, images or sounds, or intelligence of any nature by wire, radio, visual or other electromagnetic system.

The provisions of this Part are very broad. It provides generally that a licence is required to operate an external submarine cable, or to construct, alter, maintain or operate any works or facilities for the purpose of operating an external submarine cable.

With the exception of the provision of penalties, the Act leaves the administration and enforcement of the licensing requirement to be provided by regulations which may be made by the Governor in Council.

The Governor in Council may make regulations providing for the issue of licences, respecting applications for licences, prescribing the duration, terms and conditions and fees to be paid, for cancellation, or suspension of licences and generally for carrying out the purposes and provisions of Part IV of the Act.

Under section 4 of the Department of Communications Act R.S.C. 1970, c. C-24, the Minister of Communications is charged with the administration of this Act.

d) Telesat Canada Act

Under this Act a company with share capital is incorporated as "Telesat Canada". The company is not an agent of Her Majesty or a Crown corporation.

The objects of the company are to establish satellite telecommunication systems, providing on a commercial basis telecommunication services between locations in Canada. The objects of the company may be extended by letters patent to include any objects other than broadcasting for which a company may be incorporated under the Canada Corporations Act.

The company is empowered, among other things, to design, construct, operate and maintain satellite telecommunication systems; to negotiate, under the direction of the Minister, suitable arrangements for the launching of satellites; enter into contracts for the provision of services by satellites between locations in Canada; and to do all such things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the company.

The Minister has a thirty-day delaying power before the company may issue a request or accept a proposal for the construction of a satellite or earth station. This was introduced to ensure the required degree of Canadian content.

The company is not permitted, except under the direction of the Minister, to negotiate or enter into any agreement with a foreign state or representatives thereof or a corporation that is an agent of a foreign state; the company shall at the request of the Minister assist in any negotiations by or on behalf of Canada.

Authorized capital of the company shall consist of ten million common shares and five million preferred shares. Shares shall be issued to Her Majesty in right of Canada, approved telecommunications common carriers, and persons who fulfil statutory conditions; the proportion of shares to be issued in each category is determined by the Board of Directors with the approval of the Governor in Council.

The affairs of the company shall be managed by a Board of Directors consisting of seven members. So long as all of the outstanding common shares are held by Her Majesty in right of Canada or corporations that are agents of Her Majesty in right of Canada, the Board of Directors shall be appointed by the Governor in Council. Two members so appointed shall be from the public service of Canada.

Otherwise, the Act provides for some of the directors to be elected and the others to be appointed by the Governor in Council; two appointees to be members of the public service of

Canada. Only persons who are Canadian citizens ordinarily resident in Canada are qualified for election as directors.

The first president shall be designated by the Governor in Council, to hold office until the Board of Directors take office, after which the Board shall with the approval of the Governor in Council annually elect a President from among its members.

The Company is required to keep in Canada a register of share-holders and one or more registers of transfers and transmission of shares. Provisions are included prescribing the procedure to be followed for accepting a subscription for common shares by any person as a person who fulfils the statutory conditions and for allowing any transfer of such shares.

The transfer of common shares of the company that were issued to Her Majesty in right of Canada or an approved telecommunications common carrier is not valid unless entered in a register of transfers. Such transfers may not be registered unless the transfer of shares

- (a) held by Her Majesty in right of Canada is to a corporation declared by statute to be an agent of Her Majesty in right of Canada; and

(b) held by an approved telecommunications common carrier is to another approved telecommunications common carrier and has been approved by the Governor in Council.

Provision is also made for the Board of Directors, with the approval of the Governor in Council, to authorize, by by-law, an approved telecommunications common carrier to transfer common shares of the company to persons who fulfil the statutory conditions.

Subject to the charter of the company and any by-law that may be enacted for fixing the number of directors and those to be elected and appointed, each issued and allotted common share of the company carries voting rights and entitles the shareholder to one vote for each share held by him. For the purpose of election of directors of the company Her Majesty in right of Canada and any corporation that is declared by statute to be an agent of Her Majesty may not exercise voting rights. Preferred shares of the company carry no voting rights.

Statutory conditions are prescribed in respect of the acquisition and holding of common shares by persons other than Her Majesty in right of Canada, corporations declared by statute to be agents of Her Majesty in right of Canada, and approved telecommunications common carriers.

The statutory conditions referred to include the following:

- 1) Such persons who are non-residents shall not hold more than 20 per cent of the outstanding common shares of the company, and a resident shall not hold common shares for the use or benefit of a non-resident.
- 2) No common shares of the company shall be subscribed for, purchased or held in the name or right of or for the use or benefit of
 - a) a director or officer of an approved telecommunications common carrier;
 - b) a corporation associated with an approved telecommunications common carrier; or
 - c) the government of a foreign state or an agent thereof.
- 3) The number of common shares of the company held in the name or right of or for the use or benefit of a person or Her Majesty in right of any province together with the number of such shares held in the name or right of or for the use or benefit of

- a) each shareholder associated with that person or Her Majesty in right of that province; and
- b) each person who would be deemed under the statutory conditions to be associated with that person or Her Majesty in right of that province if each of such persons and that person or Her Majesty in right of that province were shareholders may not exceed two and one-half per cent of the outstanding common shares of the company.

Provision is made for the company to expropriate lands for the purpose of carrying out its objects subject to the provisions of the Expropriation Act and other provisions.

The Minister of Finance is authorized, subject to the approval of the Governor in Council, to subscribe for, acquire and hold common and preferred shares of the company for the Government of Canada.

The aggregate amount that the Government of Canada and corporations declared by statute to be agents of Her Majesty in right of Canada may at any time have invested in the company shall not exceed 30 million dollars.

Authority is given to the Minister of Finance to lend money to the company. The aggregate amounts of loans made to the company shall not exceed 40 million dollars.

e) The Broadcasting Act

This Act enunciates a broadcasting policy for Canada under which there shall be a single Canadian broadcasting system, comprising public and private elements, which is to be effectively owned and controlled by Canadians. The public element, a corporation established by Parliament is to provide a national broadcasting service that is predominantly Canadian in content and character. The Canadian broadcasting system is to be regulated and supervised by a single independent public authority.

As defined in the Act, "broadcasting" means any radiocommunication in which the transmissions are intended for direct reception by the general public. Radiocommunication is also defined in the Act, as set out in the Radio Act.

A commission is established, to be known as the Canadian Radio-Television Commission (CRTC) consisting of five full-time members and ten part-time members to be appointed by the Governor in Council. The objects of the Commission, subject to the Radio Act and directions by the Governor in Council, are the regulation and supervision of all aspects of the Canadian broadcasting system with a view to implementing the statutory broadcasting policy.

No person may carry on a broadcasting undertaking unless he is the holder of a broadcasting licence issued under the Act. A broadcasting undertaking as defined in the Act, includes a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada.

The Commission is given the power, on the recommendation of the Executive Committee, to prescribe classes of broadcasting licences and to make regulations applicable to all persons holding broadcasting licences of one or more classes. Such regulations may relate to programming, advertising, the time to be reserved for network programs, conditions for operation as part of a network, fixing the schedule of licence fees subject to the approval of the Treasury Board, and submission of information regarding programs and financial affairs. The Commission is also empowered to revoke any broadcasting licence other than one issued to the C.B.C.

An Executive Committee, consisting of the Chairman, Vice-Chairman and three other full-time members of the Commission exercises certain powers, which shall be deemed acts of the Commission. The Executive Committee may (after consultation with the part-time members in attendance at a meeting of the Commission) issue broadcasting licences for terms not exceeding five years subject to conditions related to the circumstances of the licensee. The Executive Committee may also amend licences

upon application by a licensee, issue renewals of licences, suspend a licence other than that issued to the C.B.C. and exempt broadcasting receiving undertakings from licensing.

The Commission is required to hold a public hearing in connection with the issue of a new licence or where the revocation or suspension of a licence is under consideration. The Commission shall hold a public hearing if the Executive Committee is satisfied that it is in the public interest, in respect of the amendment of a licence, the issue of a licence for a temporary network operation, or a complaint. A public hearing may also be required in connection with the renewal of a licence or where the Commission deems it to be desirable.

The Commission is required to publish in the Canada Gazette any proposed regulation or amendment to a regulation and afford licensees and other interested persons a reasonable opportunity to make representations in that respect. The Commission is also required to give notice in the Canada Gazette of applications received by it, the issue, amendment or renewal of a licence, or of a public hearing; and a copy of such a notice shall also be published in newspapers serving the area concerned.

In the issue, amendment or renewal of a licence, the Commission is subject to directions which may be issued by the Governor in Council respecting the maximum number of channels for use in a geographical area, reservation of channels for the use

of the C.B.C. or for special purposes, and the classes of applicants to whom licences may not be issued. The issue, amendment or renewal of a licence by the Commission is also subject to the applicant satisfying the requirements of the Radio Act and regulations, and requires a technical construction and operating certificate issued to the applicant by the Minister of Communications. A broadcasting licence has no force or effect where a technical construction and operating certificate that applies is suspended or revoked.

Provision is also included under which the Governor in Council may set aside the issue, amendment or renewal of a licence by the Commission or order that the Commission reconsider the matter at a public hearing, where in the opinion of the Governor in Council, the Commission failed to consider certain details. Upon such a reference back, the Commission may rescind the issue of the licence and issue it to a different person, rescind the amendment or renewal, or confirm its original decision with or without change. Where the Commission so confirms its original decision, the Governor in Council may by order set it aside within 60 days after such confirmation.

An appeal lies from a decision or order of the Commission to the Supreme Court of Canada upon a question of law, or a question of jurisdiction upon leave therefor from the Supreme Court. Subject to limitations, the Federal Court of Canada has exclusive original jurisdiction to hear and determine

every application for a writ of certiorari, prohibition or mandamus or for an injunction relative to any decision or order of the Commission or any proceedings before the Commission.

A corporation to be known as the Canadian Broadcasting Corporation is continued for the purpose of providing the national broadcasting service, in accordance with any licence or licences issued to it by the Commission and subject to applicable regulations of the Commission. Among other things, it has the power to establish, equip, maintain and operate broadcasting undertakings; make agreements with other licensees for the broadcasting of programs; originate programs; acquire broadcasting undertakings by lease or purchase; and, subject to the approval of the Governor in Council, acquire, hold and dispose of shares of capital stock of any company or corporation authorized to carry on any business that is incidental or conducive to the attainment of the objects of the Corporation.

The Corporation is an Agent of Her Majesty except as to the employment of staff, and its powers under this Act may be exercised only as an Agent of Her Majesty. Property acquired by the Corporation is the property of Her Majesty.

The Corporation is empowered to purchase, lease or otherwise acquire real or personal property for carrying out its objects. It may also expropriate land for carrying out its

objects, subject to the Expropriation Act except as otherwise provided in the Act.

f) The Canada Shipping Act

This Act includes provisions under which radio apparatus is required to be carried by ships, and regulated, for the purpose of safety and navigation, the responsible Minister being the Minister of Transport. Authority respecting the licensing of radio stations on board ships and regulation in respect of matters other than safety and navigation are exercised by the Minister of Communications under the Radio Act.

The provisions relating to safety may be divided as follows; 1) those applying to ships engaged on international voyages, implementing the Safety of Life at Sea Conventions; and 2) those applying to ships engaged on voyages on the sea coasts of Canada, the St. Lawrence River and the Great Lakes. (section 401).

Under provisions of the first type, Safety Convention Ships that are passenger ships, cargo ships of 1,600 gross tonnage or more, and nuclear ships are required to be fitted with radiotelegraph stations. Cargo ships having a gross tonnage of 300 tons or more and less than 1,600 tons are required to be fitted with either radiotelephone or radiotelegraph stations. Under the other provisions, domestic voyage ships classed as passenger ships, and cargo ships of 5,000 gross tonnage or more, are required to be fitted with radiotelegraph stations; other ships of 500 gross tonnage and less than 5,000 tons are required

to carry radiotelephone stations under such regulations as may be made by the Governor in Council. (section 401).

Provision is made whereby the Governor in Council may by regulation grant exemptions from the above-mentioned requirements. The Governor in Council is empowered to prescribe, by regulation the ship radio stations to be fitted on Canadian ships, and on ships other than Canadian ships while navigating in Canadian waters. (section 403).

The Act provides for the inspection of ship radio stations by radio inspectors appointed by the Minister of Transport, and prescribes classes of certificates that shall be carried by ships before proceeding to sea, certifying that the ship complies with the Act and regulations relating to radio, including an exemption certificate in respect of any exemption granted to the ship. (sections 406-410).

The Governor in Council, in addition to the regulations referred to requiring ships to be fitted with radio stations, is empowered to make regulations delaying the application of the Safety Convention in respect of radio requirements, and to impose a fine for violation of regulations made by the Minister of Transport. (section 403).

The Minister of Transport is empowered to make regulations for the purpose of safety and navigation, prescribing

the requirements to be complied with by ship radio stations required to be fitted by the Act or by Governor in Council regulation, watches to be kept and the certificates to be held by operators, for the inspection of ship station, how ship stations shall be operated while within Canadian jurisdiction, and prescribing radio log requirements.

The Act places the operation of the radio station on any vessel under the control of the master of the vessel, and gives the master authority to censor radio messages. A provision is included prohibiting radio messages from being divulged or used except under specified conditions such as divulging to a competent legal tribunal or as may be necessary in forwarding a message to its destination.

The master of a ship is required to transmit information concerning dangers to navigation to all ships and to authorities on shore.

g) Canadian Overseas Telecommunication Corporation Act

In this Act "telecommunication" is defined as any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system. (section 2)

A corporation is established, and empowered

- (a) to establish, maintain and operate in Canada and elsewhere external telecommunication services for the conduct of public communications;
- (b) to carry on the business of public communications by cable, radiotelegraph, radiotelephone or any other means of telecommunication between Canada and any other place;
- (c) to make use of all developments in cable and radio transmission or reception for external telecommunication purposes as related to public communication services;
- (d) to conduct investigations and researches with the object of improving the efficiency of telecommunication services generally; and

(e) to co-ordinate Canada's external telecommunication services with the telecommunication services of other nations. (section 7).

The corporation is subject to directions of the Governor in Council or the Minister with respect to the exercise of its powers. (section 3(9)).

The corporation is for all purposes of this Act an agent of Her Majesty and its power may be exercised only as an agent of Her Majesty. All property acquired or held by the Corporation is the property of Her majesty. (section 8).

The corporation may do such things for or conducive to the attainment of its purposes; and may carry on its business in Canada and outside of Canada. The corporation may buy sell, lease, contract, acquire, hold and dispose of real and personal property and enter into agreements and arrangements with any government, corporation, board, person or other body operating communication services for the interchange of messages, pooling of interests, division of tolls and revenues, sharing of expenses and generally in furtherance of the business of the Corporation. (section 9.(1)).

The amount that may be expended by the corporation under any agreement or lease, the value of any real or personal property that it may acquire or dispose of, is subject to the

limits prescribed by regulation by the Governor in Council, and any amount in excess of such limits must be approved by the Governor in Council. (section 9.(2)).

The corporation was given power to acquire property of the Canadian Marconi Company and Cable and Wireless Limited. As this purpose has been accomplished, the new revised statute contains no reference to this power.

The corporation may expropriate land for its purposes, and the Expropriation Act except, as otherwise provided in this Act, applies to the taking, acquisition or abandonment of lands expropriated by the corporation. (section 11).

For the purpose of financing its operations the corporation, may be paid by the Minister of Finance, amounts not exceeding Four and one-half million dollars from unappropriated moneys in the Consolidated Revenue Fund, and moneys appropriated by Parliament for the capital purposes of the Corporation. Interest on such monies shall be paid by the corporation. (section 12).

The accounts of the corporation shall be audited by the Auditor General. (section 16).

The corporation is subject to the Radio Act and is deemed to be a company within the meaning of Part III of the Telegraphs Act. (section 18).

h) Special Acts of Incorporation

- i) Canadian National Railways Act
- ii) An Act respecting the Canadian Pacific Railway Company, 44 Vict. c-1.
- iii) Act of Incorporation of Bell Canada.
- iv) Act of Incorporation of The British Columbia Telephone Company.

Appendix 2 List of Provincial Telecommunication Acts

BRITISH COLUMBIA

Legislation:

In British Columbia authority is exercised over public telephone, telegraph and communication systems under

- (a) The Public Utilities Act; R.S.B.C. 1960, c.323.
- (b) The Railway Act, R.S.B.C. 1960, c.329.
- (c) The Rural Telephone Act, R.S.B.C. 1960, c.343.
- (d) The Municipal Act, R.S.B.C. 1960, c.255.

Systems:

- (a) A telegraph or telephone system constructed and operated as a public utility pursuant to authority granted by the Public Utilities Commission.
- (b) A telegraph or telephone system operated by a railway company with the approval of the Minister of Commercial Transport.

ALBERTA

Legislation:

In Alberta authority is exercised over telecommunications systems under

- (a) The Alberta Government Telephones Act R.S.A. 1970 c.12.
- (b) The Municipal Telephone Act, R.S.A. 1955 c.218.
- (c) The Rural Mutual Telephone Companies Act, R.S.A. 1955 c.292.
- (d) The Rural Telephones Revolving Fund Act, Stats. of Alta. 1957, c.84.
- (e) The Water, Gas, Electric and Telephone Companies Act R.S.A. 1970, c.387.
- (f) The Public Utilities Board Act, R.S.A. 1970, c.302.
- (g) The Municipal Government Act, R.S.A. 1970, c.246.
- (h) The Railway Act, R.S.A. 1955 c.276.

Telephone Systems:

- (a) The telecommunications system operated by the Alberta Government Telephones Commission.
- (b) A municipal telephone system operated by a municipality.
- (c) A rural telephone system operated by a rural mutual telephone company incorporated under the Companies Act.

Regulatory Bodies:

- (a) The Alberta Government Telephones Commission with the Minister of Telephones as Chairman.
- (b) The Minister of Telephones under the Rural Mutual Telephones Act who may make regulations as to the manner in which a company may exercise any of the powers covered by that Act.
- (c) The Minister of Telephones under the Municipal Telephones Act to whom all municipalities other than a city must submit their proposals.
- (d) The Minister of Highways where construction or cuttings are involved in any areas outside a city, town, village

or organized municipality.

- (e) The Public Utilities Board which is empowered to enquire into the merit of any application and the financial affairs and status of any company or local authority.

SASKATCHEWAN

Legislation:

In Saskatchewan authority is exercised over telecommunication systems under

- (a) The Saskatchewan Telecommunications Act, R.S.S. 1965 c. 42.
- (b) The Telephone Department Act, R.S.S. 1965 c. 36.
- (c) The Rural Telephone Act, R.S.S. 1965, c. 161.
- (d) The Public Utilities Easements Act, R.S.S. 1965, c. 124.
- (e) The Saskatchewan Railway Act, R.S.S. 1965, c. 134.

Telecommunication Systems:

- (a) The Telecommunications system operated by Saskatchewan Telecommunications (abbreviated name: "Sask Tel"), including the "public telephone system" as defined in The Telephone Department Act.

- (b) "private telephone system", a telephone system which under the law of the province any person who has been authorized to construct, control or operate in Saskatchewan.
- (c) "rural telephone system", a telephone system owned, controlled and operated by a company under The Rural Telephone Act.

Regulatory Bodies:

- (a) The Minister of Telephones, under The Telephone Department Act, who is vested with supervisory and regulatory powers over rural and private telephone systems.
- (b) Saskatchewan Telecommunications which, as well as functioning to provide a telecommunication service, may exercise powers delegated to it by the Minister of Telephones under The Telephone Department Act in respect of rural or private telephone systems.
- (c) The Lieutenant Governor in Council, under the Saskatchewan Telecommunications Act and The Rural Telephone Act.

- (d) The Minister of Telephones, under The Rural Telephone Act, has specific powers in respect of organizing and supervising the operation of rural telephone companies.
- (e) The Minister of Highways and Transportation under the Saskatchewan Railway Act.

MANITOBA

Legislation:

In Manitoba, authority is exercised over public telephone, telegraph or other communication systems under

- (a) The Manitoba Telephone Act, R.S.M. 1970, c. T40.
- (b) The Department of Public Utilities Act, R.S.M. 1970, c. P290.
- (c) The Public Utilities Board Act, R.S.M. 1970, c. P280.
- (d) The Municipal Act, c. M225^o of the Continuing Consolidation of the Statutes of Manitoba, Stats. of Man. 1970, c.100.

Systems:

- (a) The Manitoba Telephone System.
- (b) A telephone system operated by a municipality.

Regulatory Bodies:

- (a) The Minister of Public Utilities whose responsibilities include the administration of the Public Utilities Board Act and the Manitoba Telephone Act.
- (b) The Public Utilities Board, established under the Public Utilities Board Act.

ONTARIO

Legislation

In Ontario, authority is exercised over public telephone and telegraph and other communications, under

- (a) The Telephone Act R.S.O. 1960 c.394.
- (b) The Public Utilities Act, R.S.O. 1960 c.335,
Parts III, IV and VII.
- (c) The Public Utilities Corporation Act, R.S.O. 1960
c. 336.
- (d) The Ontario Northland Transportation Commission
Act, R.S.O. 1960, c.276.
- (e) The Ontario Telephone Development Corporation Act,
R.S.O. 1960 c. 280.
- (f) The Railways Act, R.S.O. 1950 c. 331, section 131.
- (g) The Municipal Act, R.S.O. 1960 c. 249, section
379. (1), para. 7, 97 and 99.

- (h) An Act Respecting the City of Ottawa, Stats. of Ont.
1966, c. 179.

Regulatory Bodies

- (a) The Ontario Telephone Services Commission, pursuant to the Telephone Act.
- (b) The Ontario Municipal Board respecting telephone systems operated by municipalities.
- (c) The Lieutenant Governor in Council, under the Public Utilities Corporation Act, respecting companies operating telephone systems being amalgamated with or controlled by a federal undertaking.
- (d) The Lieutenant Governor in Council, under the Ontario Telephone Development Corporation Act, may make regulations concerning the management, acquisition, construction and operation of telephone systems by the Corporation.
- (e) A council of a local municipality, under the Municipal Act, respecting television antenna installations, and telegraph and telephone wires and structures.

Systems:

- (a) A telephone system established by by-law of a municipality and operated as a public utility.
- (b) A "municipal telephone system" (not a public utility) established by by-law of a municipality.
- (c) A telephone system owned and operated by a corporation holding letters patent for carrying on the business of a telephone company.
- (d) Telephone and telegraph lines operated by the Ontario Northland Transportation Commission.
- (e) A community antenna television system operated in the City of Ottawa.

QUEBEC

Legislation

In Quebec, authority is exercised over public telephone,
telegraph and other communication under

- (a) The Communications Department Act, Stats. of Que. 1969,
c. 65.
- (b) Public Service Board Act, R.S.Q. 1964, c.229.
- (c) Telegraph and Telephone Companies Act, R.S.Q. 1964,
c. 286.
- (d) Cities and Towns Act, R.S.Q. 1964, c. 193.
- (e) An Act Respecting the Town of Candiac, Stats. of Que.
1967, c.116.
- (f) Quebec Broadcasting Bureau Act, Stats. of Que. 1969, c.17.
- (g) Railway Act, R.S.Q. 1964, c. 290.

Systems or Services:

- (a) Communications services that may be promoted or established by the Minister under the Communications Department Act.
- (b) Telegraph or telephone system operated by a company constituted under the Telegraph and Telephone Companies Act.
- (c) Community Antenna Television system that may be established by a municipal council under the Cities and Towns Act (section 464a).
- (d) Broadcasting service or station that may be operated by the Quebec Broadcasting Bureau.

Regulatory Bodies:

- (a) The Minister of Communications
- (b) The Public Service Board.
- (c) A municipal council.

NEW BRUNSWICK

Legislation:

In New Brunswick, authority is exercised in respect of telephone and telegraph communications under

- (a) The Telephone Companies Act, R.S.N.B. 1952, c.226.
- (b) The Rural Telephone Companies Act, R.S.N.B. 1952, c. 198.
- (c) The Public Utilities Act, R.S.N.B. 1952, c. 186.
- (d) An Act to incorporate the New Brunswick Telephone Company (Limited), Stats. of N.B. 1888, c.78.

Telephone Systems:

- (a) Telephone systems operated by companies regulated under the Telephone Companies Act and the Public Utilities Act, principally, the New Brunswick Telephone Company Ltd.
- (b) Rural telephone systems established and regulated under the Rural Telephone Companies Act.

Regulatory Bodies

- (a) The Lieutenant Governor in Council.
- (b) Board of Commissioners of Public Utilities, established under the Public Utilities Act.

NOVA SCOTIA

Legislation:

In Nova Scotia authority is exercised over telephone,
telegraph and other communications under

- (a) The Public Utilities Act, R.S.N.S., 1967, c.258.
- (b) The Rural Telephone Act, R.S.N.S. 1967, c.273.
- (c) An Act to Incorporate the Maritime Telegraph and
Telephone Company Limited, Stats. of N.S. 1910, c.156,
as amended.

Systems:

- (a) Telecommunication system operated by a private charter company such as the Maritime Telephone and Telegraph Company Limited.
- (b) A telephone system operated by a rural telephone company established pursuant to the Rural Telephone Companies Act.

Regulatory Bodies:

- (a) The Board of Commissioners of Public Utilities.
- (b) A Municipal Council.

PRINCE EDWARD ISLAND

Legislation:

In P.E.I. authority is exercised over public telephone and telegraph communication systems under

- (a) The Electric Power and Telephone Act, R.S.P.E.I. 1951, c.49.
- (b) The Public Utilities Commission Act, R.S.P.E.I. 1951, c.133.
- (c) An Act to Incorporate the Island Telephone Company Limited, Stats.of P.E.I. 1929, c.30 as amended in Stats. of P.E.I. 1967, c.48.
- (d) An Act to Provide for the Licensing or Registration of Certain Corporations and Persons, Stats. of P.E.I. 1962, c.22.

Telephone Systems:

A Telephone system provided by a company incorporated for that purpose, the principal operator being the Island Telephone Company Limited.

Regulatory Bodies:

The Public Utilities Commission.

NEWFOUNDLAND

Legislation:

In Newfoundland, authority is exercised over public telephone and telegraph service under

- (a) The Public Utilities Act, Stats. of Nfld. 1964 No. 39.
- (b) The Telephone Service Act; An Act to Authorize the G. in C. to enter into a contract for Telephone Service, Stats. of Nfld. 1919, c.6.
- (c) An Act Respecting the Avalon Telephone Company Ltd., Stats. of Nfld. 1925, c.10. (Now called The Newfoundland Telephone Company)
- (d) The Telegraph Tax Act, R.S.N. 1952, c. 33.
- (e) The Local Government Act, Stats. of Nfld. 1966, No.31.
- (f) The City of St. John's, R.S.N. 1952, c.87.

Systems:

Telephone systems, i.e. that operated by Avalon Telephone Company Ltd., as being a public utility.

Regulatory Bodies:

- (a) Board of Commissioners of Public Utilities, under the Public Utilities Act.
- (b) A municipal council, pursuant to the Local Government Act and the City of St. John's Act.

APPENDIX 3

TELECOMMISSION

STUDY 1 (a)

ANALYSIS OF THE CONSTITUTIONAL AND LEGAL BASIS FOR

THE REGULATION OF TELECOMMUNICATIONS

SUBMITTED BY

TRANS-CANADA TELEPHONE SYSTEM

JULY 1970

ANALYSIS OF THE CONSTITUTIONAL AND LEGAL BASIS FOR
THE REGULATION OF TELECOMMUNICATIONS

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PART I: THE CONSTITUTION: GENERAL PRINCIPLES OF INTERPRETATION

The general principle underlying the distribution of legislative powers in a federal system is that matters of a general interest or which concern several of the constituents should belong to the central authority while matters of a regional interest should be dealt with by local authorities.

When a conflict arises, one level of government cannot by itself decide that its legislation shall prevail over that of the other: it is up to the judiciary to arbitrate between the legislatures. From 1867 to 1950, the Judicial Committee of the Privy Council was the highest Court. It therefore is the author of the major theories which have served in the interpretation of those sections of the British North America Act, 1867 dealing with the distribution of legislative powers.

The rapid advance of modern science and technology has created new fields which were not even thought of by the draftsmen of the B.N.A. Act. Telecommunications as known today, being non-existent in 1867, were not included in the matters enumerated in sections 91 and 92 of the Act. It therefore was and is the Court's role to find some analogy between telecommunications and other enumerated subjects and to fit them under a heading which would be appropriate considering their nature and other factors.

It is always difficult to assess the validity of a particular statute in the abstract. Such assessment will inevitably depend on its practical effect. One must look at the purpose of a statute, at its "pith and substance". If, for instance, it is found that such purpose is the regulation of a field solely reserved to the other level of government, it would be deemed ultra vires.

However, over the years, there evolved a set of rules broad enough to find general application and which may be looked at as a "code of interpretation" (1). Jurisprudence leading to the establishment of these principles may be said to have started in 1882 (2), and by the 1930's, the Judicial Committee, in the Fish Canneries case, was in a position to summarize these findings into four general propositions (3).

The first proposition enunciated by Lord Tomlin in that case is as follows:

"The Legislation of the Parliament of the Dominion so long as it strictly relates to subjects of legislation expressly enumerated in Section 91 is of paramount authority even though it trenches upon matters assigned to the Provincial legislature by Section 92."

This statement followed the decision in *Tenant v. Union Bank of Canada* (4) where it was held that a federal act on banking was valid even if it interfered with "property and civil rights", since:

"Sect. 91 sub-sect. 15, of the Act, gives to that parliament power to legislate over every transaction within the legitimate business of a banker."

The second proposition in the Fish Canneries was stated by Lord Tomlin as follows:

"The general power of legislation conferred upon the Parliament of the Dominion by Section 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest or importance, and must not trench on any of the subjects enumerated in Section 92 as within the scope of provincial legislation, unless

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- (1) Varcoe: *Legislative Power in Canada*, Carswell & Co., p. 73.
 - (2) *Russell v. The Queen*, (1882) A.C. 829.
 - (3) *Re: Regulation of Fish Canneries*, (1930) A.C. 111, p. 118.
 - (4) (1894) A.C. 31.

these matters have attained such dimensions as to affect the body politic of the Dominion."

This proposition was derived by Lord Tomlin from the Ontario Liquor Licence case (5). It relates to the general power of the federal Parliament, under the introductory clause of Section 91, to make laws for the peace, order and good government of Canada. Such laws cannot as a rule trench on a provincially reserved subject. The first part of that proposition is self explanatory and the second part may best be explained by quoting from the Liquor License case, at page 361:

"Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."

The third proposition as stated in the Fish Canneries case is as follows:

"It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91."

This is the theory of necessarily incidental powers as envisaged in A. G. Ontario v. A. G. Canada (6) and A. G. Ontario v. A. G. Canada (7).

(5) A. G. Ontario v. A. G. Canada, (1846) A.C. 348.

(6) (1894) A.C. 189 (Voluntary Assignments case).

(7) (1896) A.C. 348 (Liquor License case).

The fourth proposition of the Fish Canneries case reads as follows:

"There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail."

In summary, the difficulty of interpreting laws and judging their validity lies in the fact...

"... that there is no real short-cut in determining questions of ultra vires. The text of the statute should, in every case, be examined and such propositions as these formulated by Lord Tomlin and other generalizations to be found in great number in the decisions of the Judicial Committee (and the Supreme Court) are to be looked upon as dicta which require to be considered in relation to the particular judgment in which they are first stated. Taken from their context they may appear to have a wider significance than was intended."

"Actually it would appear that in every case in which a difficult question of ultra vires arises, resort should be had to the terms of the B.N.A. Act in the first place and general propositions relating to the construction of that instrument should be used only in the course of an examination of the text of the statute..., that it is necessary to recognize the necessity of keeping the actual language of Sections 91 and 92 constantly in view in applying the enactments of those sections." (8)

As Lord Maughan said in the "Alberta Bank Taxation" case (9), the question of ultra vires

"must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down."

(8) Varcoe: Legislative Power in Canada, Carswell & Co., p. 78.
(9) A. Alberta v. A. Canada, (1939) A.C. 117, p. 129.

PART II: JUDICIAL PRINCIPLES ESTABLISHED BY JURISPRUDENCE

Section 1

A. Works and undertakings connecting two provinces: Section 92 (10) (a)

Section 92 (10) of the B.N.A. Act gives exclusive jurisdiction to the provincial legislatures over local works and undertakings, but sets out exceptions. It reads in part as follows:

"10. Local Works and Undertakings other than such as are of the following Classes:

- a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
- b) ...
- c) Such Works as, although wholly situate within the Province are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

The provinces have no control over these excepted classes since, by virtue of Section 91 (29), all that is expressly excepted is assigned to the federal Parliament (10).

The meaning of the words "works and undertakings" has often been discussed. As their ordinary sense implies the word "works" usually has a physical connotation while the word "undertaking" does not, and suggests something in the nature of services; or as was said

(10) C.P.R. v. Parish of Notre-Dame de Bonsecours, (1899) A.C. 367.
Montreal v. Montreal Street Ry., (1912) A.C. 333.

in the Radio case (11), an "undertaking is not a physical thing but is an arrangement under which... physical things are used."

It may be noted that the words should be read disjunctively. However, the words have often been used interchangeably and for instance some of the things that were declared to be for the general advantage of Canada under Section 92 (10) (c) of the B.N.A. Act were either works or undertakings or both.

In many cases it is quite easy to determine if a work or undertaking connects one province with another; a national railway extending from Halifax to Vancouver, all operated by one company, is the perfect example. Problems have arisen for example, where the connection was merely possible and not a fact, or where certain operations of the undertaking were not those contemplated by the provisions of the subsection.

The Courts have ruled on a number of such issues and the following principles may be said to apply:

1) It is not necessary that the connection be a factual one; it is sufficient that it should be legally possible. Thus, where by the terms of its charter a company has the authority to operate throughout Canada and, in doing so would become an undertaking connecting two provinces, it remains such an undertaking even if its operations were in fact restricted to one province (12).

2) The undertaking has to be considered as a whole and its operations may not be fragmented if in fact it is carried on as a single business. In the Bell Telephone case just mentioned it was contended that the company was carrying on two businesses: one for long distance and the other for local communications. The Court answered this contention by saying:

(11) *In re: Regulation and Control of Radio Communications in Canada*, (1932) A.C. 304.

(12) *Toronto v. Bell Telephone Co.*, (1905) A.C. 52.

"... the facts do not support the contention of the Appellant. The undertaking authorized by the Act of 1880 was one single undertaking though for certain purposes its business may be regarded as falling under different branches or heads."

It should be noted that in the Aeronautics case (13), an argument based on breaking down the operations into provincial and extra-provincial was not accepted. In the Winner case, the Judicial Committee recognized that the business (of transportation by bus) "might have been carried on differently and might have been limited to activities within or without the province" but found that in fact it was not. Moreover the Committee did not "agree that the fact that it (the business) might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking"; this was contrary to the views of the Supreme Court of Canada which seemed to be willing to consider the idea of dividing the operations. The connection must be a real and effective one and not merely arranged in a fictitious way so as to avoid provincial legislation (14).

3) It is possible in some cases to disassociate an auxiliary undertaking from the operations of a company that connects two or more provinces. The operation of a hotel by a railway company, in competition with all other hotels in the city and not as a complementary service to the operations of a railway company, was held to be a separate undertaking and one of a local nature (15).

4) If within the meaning of Section 92 (10) (a), the works of one undertaking connect two provinces, the undertaking becomes subject to federal jurisdiction and no provincial legislature may interfere with its physical assets (16) nor regulate its way of

(13) *In re: Regulation and Control of Aeronautics*, (1932) A.C. 54.

(14) *A.G. Ontario v. Winner*, (1954) 4 D.L.R. 657.

Wilson v. Esquimalt & Nanaimo Ry., (1922) 1 A.C. 202.

(15) *C.P.R. v. A.G. British Columbia*, (1950) A.C. 122.

(16) *Campbell Bennett v. Comstock Midwestern*, (1954) S.C.R. 207, where it was held that provincial laws relating to seizures could not affect that part of a pipeline going through that province.

doing business (17). Similarly, employees of such undertakings will not be subject to provincial legislation governing wages and hours of work (18). But this does not mean that certain provincial legislation shall not apply to the undertaking. The problem will always be to determine the extent to which such legislation affects in practice the operations of the undertaking. The rules were stated by the Quebec Court of Appeal in a decision which was affirmed by the Supreme Court of Canada:

"While Parliament has the right to legislate for the principal object, which is to create a railway company and to authorize it to construct and operate a railway, it follows that it must also have the power to legislate on all incidents which may be required to carry out the object which it had in view, as otherwise legislation under this constitutive power would often be crude and in many cases ineffective, and sometimes even wholly inoperative. In the exercise of this power the greater includes the lesser, but the lesser elements must be essentially and strictly connected with the principal object and be primarily intended to assist in carrying out such principal object. Therefore, all powers so granted must only concern or apply to the organization of the railway company, its internal economy or management, the care of its track and stations, or the conduct and duties of its directors, officers and employees, and they cannot apply to or in any way affect the rights of parties who are neither shareholders, officers nor employees of the railway under contracts entered into by them with it or under obligations which may arise in their favour, quasi-contracts, offences and quasi-offences, which all fall under the rules of the codes and of the statutory law of the province. Any powers the Parliament might attempt to confer which might relate to or in any way affect the rights of such third parties would be an infringement of the

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- (17) C.P.R. v. Parish of Notre-Dame de Bonsecours, (1899) A.C. 367: a municipality cannot regulate the construction, repair, or alteration of a railway.
Montreal v. G.T. Railway, 65 D.L.R. 401.
 - (18) Minimum Wage Commission v. Bell Telephone Co., (1966) S.C.R. 767.
G.T. Railway v. A.G. for Canada, (1907) A.C. 65: an example of the trenching doctrine: "It is true that in so doing (regulating employees) it does touch what may be described as the civil rights of those employees. But this is inevitable."
Cant v. Canadian Bechtel Ltd., (1958) 12 D.L.R. 215.

exclusive power of the provincial legislature to make laws respecting property and civil rights..." (19)

5) When a local undertaking operating within one province interconnects with works or undertakings contemplated by the exceptions to Section 92 (10), it nevertheless remains autonomous since it is still a business carried on locally.

In the Montreal Street Railway case, the Courts had to determine whether the Board of Railway Commissioners for Canada (a federal body) could set tariffs for "through traffic" over a federal line and a provincial one. One of the arguments was that federal jurisdiction over the provincial line was necessarily incidental to jurisdiction over the federal line since the same traffic was carried on both and that if it were to be otherwise, it would prove most inconvenient. In the Supreme Court, Duff J. rejected the federal argument and stated as a general principle:

"Can it fairly be said that in passing legislation which may thus change 'in toto' the character of the undertaking of the provincial railway Parliament is, in substance, exercising its powers to legislate for what if the legislation become effective must be the subsidiary undertaking? Then it is argued that there must be found vested in one single authority the power to legislate wholly with regard to through traffic. But division of legislative authority is the principle of the 'British North America Act', and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division that is the end of the federal character of the Union." (20)

Thereafter, the Judicial Committee declared the Board of Railway Commissioners to have no jurisdiction over the provincial line:

(19) Macdonald v. Riordan, (1899) 8 Que. Q.B. 555 p. 573.
affirmed: 30 S.C.R. 619.

(20) Montreal Street Ry., v. City of Montreal, 43 S.C.R. 197, p. 232.

"One of the arguments urged on behalf of the appellants was this: The through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the provincial Legislature because that Legislature has no jurisdiction over a federal line, therefore it must be controlled by the Legislature of Canada. The answer to that contention is this, that so far as the 'through' traffic is carried on over the federal line, it can be controlled by the Parliament of Canada. And that so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature, and the two companies who own these lines can thus be respectively compelled by these two Legislatures to enter into such agreement with each other as will secure that this 'through' traffic shall be properly conducted; and further that it cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of 'through' traffic." (21)

The same reasoning was followed by the Board of Transport Commissioners for Canada in the Normetal case where the Board quoted Duff J. when he said in the Montreal Street Railway case that "the difficulty could be met by the constitution of a joint board or separate boards authorized to act together and empowered to deal with such cases." (22)

The same principle must be applied to a provincial undertaking that reaches the boundaries of a province and there connects with an undertaking being carried on in the adjoining province.

"Two highways, one in New Brunswick and one in Nova Scotia which meet, in a sense connect the two provinces, but it cannot be said of each highway separately that it is a work or undertaking connecting one province with the other." (23)

(21) *Montreal v. Montreal Street Ry.*, 1912 A.C. 333, p. 346.

(22) *Normetal Mining Corp. v. C.N.R.*, 52 C.R.T.C. 92 in which the Board of Transport Commissioners for Canada declined jurisdiction over a provincial railway line even though it connected to the C.N.R. See also *British Columbia Electric Railway Co. v. C.N.R. et Al*, (1932) S.C.R. 161, and
The Queen v. Board of Transport Commissioners for Canada, (1968) S.C.R. 118.

(23) *S.M.T. (Eastern) Ltd. v. Ruch*, (1940) 1 D.L.R. 190, at p. 195.

Following these decisions, amendments were made to the Railway Act; Section 256 (3) now provides that where federal and provincial lines connect, the Canadian Transport Commission may sit jointly with the proper provincial body and make orders regarding the interconnection between the two companies.

The result might, however, be different than that in the Montreal Street Railway case if the provincial or local railway is operated and managed by a federal undertaking. In the Luscar Collieries case (24) the provincial railway was, by agreement, operated and managed by the C.N.R. with which it interconnected and all traffic going over it was the latter's. The Judicial Committee held that these facts were sufficient to make the local railway a railway connecting two provinces and therefore subject to federal jurisdiction.

Section 1

B. Works and undertakings declared to be for the general advantage of Canada: Section 92 (10) (c)

Purely local works or undertakings although situated within one province, have been declared to be for the general advantage of Canada and as a result come under federal jurisdiction. In *Montreal v. Montreal Street Railway* (25), one of the railways was federally regulated because it had been declared to be for the general advantage of Canada although it was wholly situated on the Island of Montreal.

At present the works of two telephone companies have been declared to be for the general advantage of Canada: Bell Canada and British Columbia Telephone Company (26). Bell Canada's original Act of Incorporation (27) was amended in 1882 (28) to include such declaration since doubts had apparently arisen as to which government should regulate it.

Section 2 of the Yellowknife Telephone Company's Act of Incorporation (29) declares "the works and undertaking of the Company" to be for the general advantage of Canada.

(25) 1912 A.C. 333.

(26) (1916) 6 - 7 George V c. 66.

(27) (1880) 43 Victoria c. 67.

(28) (1882) 45 Victoria c. 95.

(29) (1947) 11 George VI c. 95.

Section 1

C. Works and undertakings of a local nature: Section 92 (10)

This refers to the opening words of sub-section 10 of Section 92, exceptions to which have just been reviewed. Naturally more problems arose in regard to the exceptions, since provincial jurisdiction over purely local works having no connection with other provinces or other countries would not likely be questioned.

However problems do arise when a locally operated undertaking in some way becomes related to a federal matter enumerated in Section 91.

In the Eastern Canada Stevedoring case (30), the Supreme Court of Canada held that stevedoring was, under the circumstances, directly connected with "navigation and shipping" (a federal power) and subject to federal legislation. On the other hand, the Ontario Court of Appeal (31) held that employees working from a ship in establishing and servicing off-shore sites for underwater drilling were subject to provincial legislation because the "navigation and shipping" aspect of the operations was only incidental.

In the case of *Ladore v. Bennett* (32), provincial legislation which dealt incidentally with the subject of interest (federal) was held to be intra vires. Again, in the case of *Lethbridge Irrigation District v. I.O.O.F.*, referring with approval to the *Ladore* case, the Committee described the interest provision in the latter case as "incidental" and stated:

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- (30) Reference: *Validity of the Industrial Relations and Disputes Investigation Act*, (1955) S.C.R. 529.
 - (31) *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board*, (1960) 24 D.L.R. (2nd) 673.
 - (32) (1939) A.C. 468.

"The Board had no difficulty in holding that the regulation of the interest payable on the debentures of the City was not an invasion of Dominion powers." (33)

As seen earlier, the courts separated the operation of a hotel as something of a local nature from the other operations of a national railway company (34).

The foregoing review expresses the present state of the judicial authorities on the exceptions to Section 92 (10) insofar as they may relate to telecommunications.

It is possible through connections between all provinces to communicate from almost any part of the country to any other part by means of telecommunications. It does not however follow that the different undertakings providing these services necessarily fall under federal jurisdiction. In all cases just reviewed one of the decisive factors has been the mode of operation. In deciding that The Bell Telephone Company of Canada was an undertaking connecting two provinces, the Judicial Committee considered its legally permissible and factual operations and found that they were one business. Because the Montreal Street Railway was self-managed and operated, the Committee found that its connection with a national railway did not deprive it of its provincial character. On the other hand, the local railway (Luscar) which was operated by the national railway came under federal jurisdiction. In none of these cases was the physical connection the determining factor in the decision.

In considering jurisdiction over telecommunications, the railway cases should be referred to for the governing principles. It then follows that notwithstanding connection with other provinces, telephone companies operating within one province and managed as such are under provincial jurisdiction.

(33) (1940) A.C. 513.

(34) C.P.R. v. A.G. British Columbia, (1950) A.C. 122.

The word "telegraph" is found in Section 92 (10) (a), with the words lines of steamships and railways. It therefore follows that any other means of communications should be associated with those enumerated therein.

"The words 'and other works and undertakings...' in Section 92 (10) (a) follow the more specific enumerations; lines of steam and other ships, railways, canals, telegraphs. It would seem appropriate, in this context, to read 'other works and undertakings' ejusdem generis with the previously listed subjects. Courts have, on occasion, recognized this and, accordingly, viewed other works and undertakings as confined to those of a transport or communication nature, a description which fits all the enumerated categories..."

The other works and undertakings have been held to include telephone systems..." (35)

Moreover, the courts have discussed telephone when talking of railways and vice-versa. For example, in the Montreal Street Railway case, the Supreme Court of Canada stated:

"That it might be convenient that the Dominion and the provincial railway should have joint traffic arrangements and that these should be under single control does not advance the argument of the respondents. The same argument would apply to the case of a provincial line of steamships having a terminus near a station or terminus of a Dominion railway or a provincial telephone line or telegraph line which it might be thought useful to link up with the railway telegraph system. Does anybody seriously think that legislative control of the railways involves (as necessarily incidental to it) under the sub-sections quoted, the legislative power to effect such amalgamations and to reorganize the provincial undertakings to suit the exigencies of the altered conditions?" (36)

(35) "Transportation, Communication and the Constitution, the Scope of Federal Jurisdiction" by C.H. McNairn, Canadian Bar Review, Vol. 47 at p. 359.

(36) Montreal Street Ry., v. Montreal, 43 S.C.R. 197, p. 232.

In the *Toronto v. Bell* case, the Judicial Committee considered a telephone company connecting two provinces to be an exception to Section 92 (10) along with railway and telegraph companies.

"Sect. 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company the objects of which as defined by its Act of incorporation contemplate extension beyond the limits of one province is just as much within the express exception as a telegraph company with like powers of extention."
(37)

Section 2

A. The federal power to incorporate

Whereas Section 92 (11) gives a provincial legislature the power to incorporate "companies with provincial objects" there is nothing so specific in Section 91 and the power being one which belongs "de jure" to any state, the federal Parliament derives it from the general introductory clause giving it the power to make laws for "the peace, order and good government."

Therefore in the field of incorporation, all corporate objects that are not exclusively provincial would fall under federal jurisdiction. A matter might be non-provincial in territory, when it contemplates an activity to be carried on in more than one province (e.g. a department store operating branches in several provinces) or it might be non-provincial in function, when the activity contemplated is one falling under federal jurisdiction even though it will be confined to one province (e.g. a stevedoring organization operating in one port only).

1. - Federal laws affecting federal or "Dominion" companies.
 - Regulation of trade and commerce (38)

The Parsons case (39), restricted the power of the federal Parliament under Section 91 (2), the "regulation of trade and commerce" clause. It was argued that because the company was federally incorporated, only the federal Parliament had power to regulate all aspects of its business. On the other hand, since the problem concerned insurance contracts, it was contended that this aspect was in relation to "property

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- (38) One must be careful not to confuse these companies, whose claim to federal jurisdiction is either that they functionally are not within the enumerated heads of Section 92 or that they may operate in more than one province, with those which we have discussed earlier under the exceptions to Section 92.
- (39) *Citizens Insurance Co. v. Parsons*, (1881) A.C. 96.

and civil rights", (a provincial matter) and that only provincial legislation could regulate it. The Judicial Committee decided in substance that the federal power to incorporate a company did not automatically imply the power to regulate its business in aspects which were exclusively reserved to the provinces.

In a later case it clearly stated its position:

"Their Lordships) do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial Legislatures over civil rights in general." (40)

The federal power to regulate the business activities of federally incorporated companies has been largely taken away by the very restrictive judicial interpretation which has been given to the power of "regulation of trade and commerce."

It is necessary to differentiate between "trade and commerce" in general and a particular trade.

"The words 'regulation of trade and commerce', in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense." (41)

And in the John Deere decision:

"This head must, like the expression 'property and civil rights in the province', in Section 92 receive a limited interpretation. Their Lordships think that the power to regulate trade and commerce at all events enables the

(40) John Deere Plow Co. v. Wharton, (1915) A.C. 330, p. 340.
(41) Citizens Insurance Co. v. Parsons, (1881) A.C. 96, p. 112.

Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed upon such powers." (42)

The trade and commerce power of the federal Parliament has been urged many times but in most cases the Judicial Committee has limited the scope of this power.

In declaring the Board of Commerce Act and the Combines and Fair Prices Act to be invalid because they interfered with some of the subjects of Section 92, Viscount Haldane stated:

"In the case of Dominion companies their Lordships in deciding the case of John Deere Plow Co. v. Wharton, expressed the opinion that the language of Sect. 91 head 2 could have the effect of aiding Dominion powers conferred by the general language of S. 91. But that was because the regulation of the trading of Dominion companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it. Where there was no such power in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the Provinces. This result was the outcome of a series of well-known decisions of earlier dates, which are now so familiar that they need not be cited." (43)

Following the same principles, it has been decided that the heading of Section 92 (2) only referred to general trade and commerce and could not interfere with particular trades (44); that a federal act seeking to regulate the transport and storage of grain was ultra vires as an attempt to regulate a particular trade (45); that a federal act creating a board to regulate the marketing, distribution and sale of

(42) John Deere Plow Co. v. Wharton, (1915) A.C. 330, p. 340.

(43) In re: Board of Commerce Act & Combines & Fair Prices Act, (1922) 1, A.C. 191, p. 198.

(44) Toronto Electric Commissioners v. Snider, (1925) A.C. 396.

(45) The Queen v. Eastern Terminal Elevator Co., (1925) S.C.R. 434.

natural products within a province was legislation affecting property and civil rights (46); that provincial legislation restricting the sale of margarine was in respect of a particular trade and therefore intra vires (47).

2. - Provincial laws affecting federal companies.

Courts and authors have evolved some broad rules on this subject.

(1) Provincial legislation may not interfere with the corporate powers, or the status or the capacity of a federally incorporated company and any attempt to do so would be ultra vires.

It is necessary to distinguish here between the capacity of a company and its rights:

"The distinction amounts to no more than this, that just as a natural person may be capable of doing things he has no right to do so a company's capacity may be broader than its rights." (48)

"Right may be said to mean capacity plus the legal power to exercise the capacity." (49)

It is up to the federal Parliament by virtue of its power to regulate trade and commerce to prescribe the extent and limitations of the powers or capacity of companies it creates (50).

In the John Deere case the Judicial Committee had to pronounce on the validity of a provincial Act requiring all extra-provincial companies to apply for the issuance of a licence before carrying on business in the province. In the later case of Great West Saddlery, the Committee

(46) *In re : Natural Products Marketing Act*, (1936) S.C.R. 398.

(47) *Canadian Federation of Agriculture v. A.G. Quebec*, (1951) A.C. 179.

(48) *Wegenast : Canadian Companies*, p. 36.

(49) *Wegenast : Canadian Companies*, p. 131.

(50) *John Deere Plow Co. v. Wharton*, (1915) A.C. 330.

summarized its decision in John Deere as follows:

"If therefore in legislating for the incorporation of companies under Dominion Law and in validly endowing them with powers, the Dominion Parliament has by necessary implication given these companies a status which enables them to exercise these powers in the Provinces, they cannot be interfered with by any provincial law in such a fashion as to derogate from their status and their consequent capacities or as a result of this restriction, to prevent them from exercising the powers conferred on them by Dominion Law." (51)

2) In assessing the validity of provincial laws insofar as they relate to federally incorporated companies, it is first necessary to determine their "pith and substance". To be valid the legislation must in "pith and substance" be related to one of the matters enumerated in Section 92. If it is not so related, the paramountcy doctrine stated in the first proposition of the Fish Canneries case would apply. In the Great West Saddlery case, the test was put thus:

"Can the relevant provisions of all or any of the three sets of Provincial statutes be justified as directed exclusively to the attainment of an object of legislation assigned by Section 92 to the Legislatures, such as is the collection of direct taxes for Provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion and so affect its status?"(52)

3) Validly enacted provincial statutes of general application are binding on federal companies.

"When a legislature authorizes the incorporation of a company with given objects and powers it does not intend thereby to authorize it to ignore the general law of the land, any more than a law which provided that married women shall have full contractual capacity would entitle them to do so. The incorporating statute confers powers on a company qua company but leaves its rights as a business to be

(51) Great West Saddlery Co. v. The King, (1921) A.C. 91, p. 114.
(52) Great West Saddlery Co. v. The King, (1921) A.C. 91, p. 114.

determined by the legislation (if any) which governs that business." (53)

In the Companies Reference case, the Supreme Court said:

"The Companies, therefore, which owe their corporate character to this Dominion authority, once they receive that character, are not (as such) entities set apart and as a privileged class exempt from the jurisdiction of the provinces in relation to other matters comprised in the subjects assigned exclusively to the provinces"..."In each province the Dominion company which as a company is within the provincial territory is (with the reservation indicated above) subject to the provincial jurisdiction and to the Dominion jurisdiction just as other companies and natural persons are." (54)

It has been suggested at times that as a result of its power of incorporation, the federal Parliament should have control over the business carried on by federally incorporated companies under its power to regulate trade and commerce. But, as illustrated, the decisions of the Judicial Committee have interpreted this power in such a way that it is applicable only in a very few instances.

(53) Ziegel : Canadian Company Law, p. 175.

(54) In re : Incorporation of companies in Canada, 48 S.C.R. 331, p. 410.

Section 2

B. The provincial power to incorporate: Section 92 (11)

"Provincial objects" as used in Section 92 (11) may be understood territorially or functionally. In the early stages of constitutional history the former meaning was accepted ; later the provinces empowered their companies to operate beyond their borders as long as the subject was within their competence.

The matter was decided by the Privy Council in the Bonanza Creek case (55) where it was held that a company which was provincially incorporated by letters patent could not, ipso facto, operate in another province but that it had the "capacity" of accepting the "rights" necessary thereto from the other jurisdiction. There would today be no problem since all provinces have, following the Bonanza Creek case, provided for the licensing of extra-provincial companies. In such cases the operations are subject to local legislation.

(55) Bonanza Creek Gold Mining Co. v. The King, 1916 1 A.C. 366.

Section 3

A. Peace, Order and Good Government : Section 91, introductory clause.

The introductory clause of Section 91, dealing with the power of the federal Parliament, reads :

"It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

In the early judicial history of the B.N.A. Act the Judicial Committee used this provision to bring the sale of liquor under federal jurisdiction. It decided that the impugned legislation could not be classified under any of the headings in Section 92 although it was inevitable that in some aspects it would affect some of them. After reviewing the general power of Parliament to make laws for the peace, order and good government of the country, the Committee stated that "few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights ; and it could not have been intended when assuring the provinces exclusive legislative authority on the subjects of property and civil rights to exclude Parliament from the exercise of this general power whenever any such incidental interference would result from it." (56)

Soon after, however, realizing that few matters, if any, could be said not to concern the peace, order and good government of the country, the Committee started restricting the application of the provision. It put more emphasis on the exceptional nature of any legislation enacted under that clause which, it said, must be "unquestionably" of

(56) Russell v. The Queen, (1882) A.C. 829.

national interest and must not "encroach upon any class of subjects which is exclusively assigned to provincial legislatures by Section 92." (57)

There then came a series of judgments delivered through Viscount Haldane, which minimized the effects of the two decisions above mentioned and sought to give more importance to the provincial jurisdiction. These ultimately led to the second proposition of the Fish Canneries case (58).

The first of these series of judgments, clearly acknowledged that the general power of Parliament under the introductory clause of Section 91 could only be exercised if the subject matter does not fall within the enumerated heads of Section 92.

"It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of Sect. 91 of the B. N. A. Act confers, does not, unless the subject-matter of legislations falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters enumeratively entrusted to the provincial legislatures by the enumeration in Sec. 92. There is only one case, outside the heads enumerated in Sec. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the province under Sec. 92. Russell v. The Queen, 7 App. Cas, 829, is an instance of such a case." (59)

In 1921, in the Board of Commerce case (60) Viscount Haldane referred again to the Russell decision and considered the legislation questioned in the latter case to be of an emergency nature. Since the act under review did not meet this requirement of being exceptional and urgent and of not being confined to any temporary purpose, it was declared *ultra vires*.

(57) A. G. Ontario v. A. G. Canada, (1896) A. C. 348.

(58) Re: Regulation of Fish Canneries, (1930) A. C. 111.

(59) Insurance Act Reference, (1916) A. C. 588, p. 595.

(60) Re: Board of Commerce Act & Combines & Fair Prices Act, (1922) 1, A. C. 191.

A few years later, the Judicial Committee reiterated the principles of the Board of Commerce case but declared the impugned legislation to be valid in view of the then existing state of war when the statute was enacted (61).

In 1932 the Judicial Committee rendered two decisions wherein it found that the matters under consideration not being enumerated in either Sections 91 or 92 should automatically fall under the general clause of peace, order and good government since that clause was the basis of Parliament's full authority.

In the Aeronautics case it said :

"There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion ; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada." (62)

In the Radio case:

"Being, therefore, not mentioned explicitly in either Section 91 or Section 92, such legislation falls within the general words at the opening of S. 91 which assign to the government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." (63)

It should be noted that in both cases the judges found additional grounds for sustaining federal jurisdiction, in the first case because an international treaty was involved, and in the second because broadcasting fell within Section 92 (10) (a) under the general words "undertakings

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- (61) Fort Frances Pulp and Power v. Manitoba Free Press, (1923) A.C. 695.
(62) In re : Regulation and Control of Aeronautics in Canada, (1932) A.C. 54, p. 77.
(63) In re : Regulation and Control of Radio Communications in Canada, (1932) A.C. 304, p. 312.

connecting the Province with any other or others of the Provinces..."

The Employment and Social Insurance case (64) is an illustration of the trenching doctrine as stated in the Fish Canneries case. It recognizes the inevitability of some federal legislation touching provincial matters in its application. In such cases the "pith and substance" of the legislation should be considered. If the "pith and substance" of such legislation is to affect or regulate matters enumerated in Section 92, it must be declared invalid.

Subsequent cases (65) on the application of the general introductory clause of Section 91 followed the same line of thinking.

As stated at the beginning of this brief, matters that were not contemplated in 1867 must be fitted into headings general enough to encompass them and it might be suggested that telecommunications could be brought under the general heading of peace, order and good government. Undoubtedly if the Russell and Local Prohibition cases (66) were considered in isolation such a possibility might appear to exist. However the later judgments delivered through Lord Haldane have practically eliminated this federal power.

Most telephone companies were incorporated for the purpose of serving local or regional areas. The provincial government-owned companies in Manitoba, Saskatchewan and Alberta were established to meet, and are operated in direct relation to, the needs of the people of these provinces, and are an important part of the development policies of their governments.

(64) A.G. Canada v. A.G. Ontario, (1937) A.C. 355.

(65) A.G. Canada v. A.G. Ontario (Labour Convention case) (1937) A.C. 326.
Cooperative Committee of Japanese Canadians v. A.G. Canada,
(1947) 1 D.L.R. 577.
Canada Federation of Agriculture v. A.G. Quebec,
(1950) 4 D.L.R. 689.
C.P.R. v. A.G. British Columbia, (1950) A.C. 122.
(66) Russell v. The Queen, (1882) 7 A.C. 829.
A.G. Ontario v. A.G. Canada, (1896) A.C. 348.

The fact that such provincial systems connect at the provincial boundaries does not deprive them of their local character. They remain "local works and undertakings" coming under one of the enumerated heads of Section 92 and are by that very fact precluded from falling under federal jurisdiction.

Section 3

B. Matters of a local nature : Section 92 (16)

This is the last sub-section of Section 92 and reads :

"Generally all Matters of a merely local or private Nature in the Province."

We refer to the above discussion on works and undertakings of a local nature ; however it must be stressed that the word "matter" is much broader than "Works and Undertakings" and has no physical connotation *per se*. Thus legislation enacted by a province to help a society out of its financial embarrassment (which is neither a work or an undertaking) was held valid under that provision since it related "to a benevolent or benefit society incorporated in the city of Montreal within the Province, which appears to consist exclusively of members who would be subject *prima facie* to the control of the provincial legislature." (67)

(67) L'Union St-Jacques de Montreal v. Belisle, L.R. 6 P.C. 31.

PART III: APPLICATION OF SUCH PRINCIPLES TO TELECOMMUNICATIONS

Section 1: The telephone

A. Description of services

There are nowadays numerous services offered by the telephone companies but basically the service is one permitting communication from one point to another. Whereas the communication originally consisted of sound being transmitted over a wire, it is now much more sophisticated. For instance, if one considers the powers given to The Bell Telephone Company of Canada, the difference will appear: the powers of the Company, as stated in its original Act of Incorporation (68) were "to build, establish, construct, purchase... any line or lines for the transmission of messages by telephone..." At present, the powers of the same Company are "to transmit, emit or receive and to provide services and facilities for the transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electro-magnetic systems and in connection therewith to build, establish, maintain and operate... all services and facilities expedient or useful for such purposes, using and adapting any improvement or invention or any other means of communicating." (69)

Most telephone companies now offer two kinds of services which should be considered for the purpose of this study: local services and long distance services. Through a system of interconnection established by and between independent companies, it is possible to communicate with almost any part of the country. If a local communication, the whole will be carried on a single company's facilities; if it is a long distance one, it will be carried on as many facilities as there are companies along its route.

(68) 1880, 48 Victoria, c. 67.

(69) 1967-68, 16-17 Elizabeth II, c. 48.

Section 1: The telephone

B. Power to regulate

Considering the principles established by the decisions reviewed in Part II of this study and the services offered by telephone companies, the power to regulate these companies and the services which they offer must now be determined.

In trying to do so, it must be borne in mind that in a federal system of government each level is supreme in the field or jurisdiction which has been allocated to it. Moreover, to preserve the "character of the Union" (70), great respect must be given by one level of government to the other and one should not invade the other's field of jurisdiction. The federal Parliament has a great power in being able to legislate for the peace, order and good government of a country; as pointed out by the Judicial Committee (71), very few instances of legislation could be said not to affect the peace, order and good government; if this power was to be strictly and literally applied, the Provinces would indeed be left with hardly anything on which to legislate.

Another very important point to keep in mind is that inconveniences which might arise as a result of any constitutional arrangement should not be a reason to hold that such arrangement is not the one contemplated by the Constitution. The words of Duff J., on this point ought to be the guiding principle.

"But division of legislative authority is the principle of the 'British North America Act', and if the doctrine of the necessarily incidental powers is to be extended to all cases in which inconvenience arises from such division that is the end of the federal character of the Union." (72)

(70) *Montreal v. Montreal Street Railway*, 43 S.C.R. 197.

(71) *A.G. Ontario v. A.G. Canada*, (1896) A.C. 348.

(72) *Montreal v. Montreal Street Railway*, 43 S.C.R. 197, p. 232.

There is no doubt that, for the reasons explained earlier, telephone companies are undertakings contemplated by Section 92 (10) of the B.N.A. Act. This fact precludes them from being considered under any different heading, as seen in the second proposition of the Fish Canneries case (73) quoted in Part I of this study. Accordingly, and following the phraseology and classification adopted in Section 92 (10), the companies will be either local or will connect one Province with another or others or will be declared to be for the general advantage of Canada. The power to regulate will be determined by the group under which the telephone company is to be classified.

Five possible regulatory situations may be envisioned:

- A. A provincial legislature has sole jurisdiction to regulate a provincially incorporated telephone company which operates within the Province.

Such a company remains a strictly local work and undertaking as is a railway company wholly situated in one Province.

All aspects of the activities of such a company are subject to provincial laws and the latter also determines its corporate status and capacity. For instance, provincial labour legislation governs its relations with employees; its physical assets are subject to the provincial law of seizures or attachments; and provincial regulatory bodies have jurisdiction over all its regulated services.

- B. Provincial legislatures have sole jurisdiction to regulate companies of the type mentioned in situation A, notwithstanding the fact that their systems of lines connect at the borders of their respective provinces.

In view of the word "connecting", used in Section 92 (10) (a), there could be a tendency to bring within that exception all undertakings connecting together at provincial boundaries but, as has been seen, the Courts have limited the significance of the connecting factor. When a local telephone company operates within one Province and interconnects at the border with the system of another local telephone company operating within one province, both remain under their respective Province's jurisdiction. Nor does such connection give jurisdiction to the federal parliament over the rates for the traffic going from one to the other or, as they are referred to in railway legislation, "Joint Through Rates."

C. The federal Parliament, acting alone, has no jurisdiction to regulate "Joint Through Rates" between companies of the type mentioned in situation A and companies subject to federal jurisdiction.

The Montreal Street Railway Co. case (74), the Normetal case (75) and the British Columbia Electric Railway case (76), are applications of this principle. In the first case the provincial railway interconnected with a railway subject to federal jurisdiction, by virtue of a Declaration under Section 92 (10) (c); while the last two cases dealt with local railways interconnecting with one subject to federal legislation by virtue of Section 92 (10) (a). The Railway Act provides for joint sessions to regulate such "Joint Through" rates.

D. The federal Parliament has jurisdiction to regulate a telephone company which operates in more than one Province or which has been declared to be for the general advantage of Canada.

(74) *Montreal v. Montreal Street Ry.*, (1912) A.C. 333.

(75) *Normetal Mining Corp. v. C.N.R.*, 52 C.R.T.C. 92.

(76) *British Columbia Electric Railway Co. v. C.N.R. et Al*, (1932) S.C.R. 161.

This principle is quite evident, in view of the fact that telephone companies are to be included in the expression "local works and undertakings", within the meaning of Section 92 (10) (a).

E. The federal Parliament has jurisdiction over the "Joint Through Rates" negotiated solely between telephone companies of either type mentioned in situation D.

APPENDIX 4

CONSTITUTIONAL JURISDICTION IN CANADA IN RELATION TO TELECOMMUNICATIONS WITH PARTICULAR REFERENCE TO INTERPROVINCIAL TELEPHONE RATES - AN ALTERNATIVE VIEW.

I. The Present "Working Division" of Constitutional Powers

This analysis rests on the view that the division of jurisdiction between Parliament and the provincial legislatures that is valid in strict constitutional law in relation to telecommunications is not the same as the division of powers as exercised in actual practice.

To begin, let us try and outline the present "working division".

The federal government completely regulates¹ certain specific telephone companies such as Bell Canada and the British Columbia Telephone Company, as well as certain communication modes employed in telephony, such as radio, including satellites. The provincial governments also regulate completely certain telephone companies, such as the Manitoba Telephone System and the New Brunswick Telephone Company Limited. In addition, there are specific matters related to all Canadian telephone companies which are regulated either exclusively by the federal government, e.g. criminal law matters such as making harassing, indecent or threatening calls (ss. 315 and 316 C.C.C.), or exclusively by provincial governments, such as sales tax on telephone calls.

Within this mosaic of authority, are interprovincial telephone calls treated as separate matters for regulation? The general answer is that they

1. The term "regulate" in this appendix is used not necessarily in an administrative sense, but rather in the constitutional sense, to denote authority to legislate in relation to the particular subject. The phrase "rates and services" refers to the objects of regulation in general. There may, however, be specific service functions which cannot be regulated.

are treated simply as part of the business of the enterprises which make them available. The rates can thus vary from one jurisdiction to another even as regards calls between the same two points, as one jurisdiction may decide that revenues from extra-provincial calls shall subsidize local calls and the other just the opposite. There are agreements among the companies themselves providing for revenue-sharing on interprovincial calls (and the association known as the Trans-Canada Telephone System, to be discussed below, co-ordinates these agreements) but as no one jurisdiction can prevail over any other,² there is no direct regulation of interprovincial calls "at both ends" as it were.

This is not to say that this is not possible under existing law (still leaving aside the constitutional validity of the existing legal situation). In fact a reading of s. 380(12) of the Railway Act suggests that the scope of federal authority over certain interprovincial rates and services is not inconsiderable.

The Canadian Transport Commission (C.T.C.) is the federal entity responsible for regulating the telephone companies considered to be within federal jurisdiction, such as Bell Canada and the B.C. Telephone Co. The C.T.C. is empowered, under s. 380(12) of the Railway Act as follows:

"380. (12) All contracts, agreements and arrangements between the company and any other company or any province, municipality or corporation having authority to construct or operate a telegraph or telephone system or line, whether such authority is derived from the Parliament of Canada or otherwise, for the regulation and interchange of telegraph or telephone messages or service passing to and from their respective telegraph or telephone systems and lines, or for the division or apportionment of telegraph or telephone

Z. Cf. The Supreme Court of Canada decision of April 5, 1971 in the case of Québec-Téléphone v. The Bell Telephone Company of Canada and A-G Qué. and A-G Canada. While this is not a case where interprovincial rates or services are involved, it does raise certain related questions.

tolls, or generally in relation to the management, working or operation of their respective telegraph or telephone systems or lines, or any of them, or any part thereof, or of any other systems or lines operated in connection with them or either of them, are subject to the approval of the Commission, and shall be submitted to and approved by the Commission before such contract, agreement or arrangement has any force or effect."

Accordingly, the C.T.C. may now, it is suggested, regulate interprovincial telephone call rates and services in the following five ways,³ even though in actual practice it exercises its authority only in the first: (a) Where a company it regulates covers two provinces it may directly regulate the rates of the calls between any points in the territory. Thus the C.T.C. may regulate the rates of calls between, say, Montreal and Toronto. This in fact flows from its jurisdiction over Bell Canada and does not depend on s. 380(12).⁴ (b) Where the calls are between points in provinces covered by different federally regulated companies, s. 380(12) does come into play and the C.T.C. may regulate any arrangements regarding the calls between points in the different provinces. An example would be calls between Toronto and Vancouver, points covered by Bell Canada and the B.C. Telephone Company respectively.⁵ (c) In relation to calls from points within territories covered by federally regulated companies to points outside these territories, the C.T.C. may now regulate them indirectly via the Commission's power to regulate the federal party. This amounts to a veto power over agreements governing rates and services between, say, St. John's and Toronto.⁶ (d) Similarly, where a call must cross through the facilities of a federally regulated company, the C.T.C. could indirectly affect its rates via its power to approve or refuse the federal

3. It is not intended in this discussion to preempt the answers to the constitutional questions involved in this subject. These will be suggested later in the analysis. The point is merely to suggest that under the existing Railway Act provision, the rates governing such calls could now be regulated, directly or indirectly, through the intercorporate arrangements governing them.

4. Bell Canada is subject to the C.T.C. in virtue of its Special Act of Incorporation (c. 67, 1880 etc.). Cf. s. 380(1) & (2) of the Railway Act.

5. See the submission of the Trans-Canada Telephone System to the Telecommission (Appendix III above, p. 34) where the jurisdiction of Parliament over these "Joint Through Rates" is acknowledged. This would extend right across Canada as CN/CP Telecommunications, which is also subject to federal jurisdiction, provides telephone services to many parts of Newfoundland.

6. However note the Québec-Téléphone/Bell Canada case cited in note 2 above.

company's commitment regarding the use of its facilities, related charges and possible rate-sharing arrangements. The example here would be the agreements (formal or tacit) regarding calls from Winnipeg through Bell Canada facilities to Moncton. This might also cover the federal companies' participation in the Trans-Canada Telephone System discussed below. (e) Finally, through the combined effect of regulation in regards to (a) to (d) above, and considering that over 70% of Canadian telephones are in the territory served by federally regulated companies, it is clear that the C.T.C. now has a potentially tremendous economic impact over all interprovincial telephone rates in Canada.

II. From Existing Practice to Constitutional Law

Even if the above picture is valid and if it provides a clarification of the existing situation, it is limited in at least two respects. First, it is based (as regards (b) to (d)) not on the constitution, but only on a legal interpretation of a provision of an existing federal statute. And secondly, it relates directly only to agreements about the activity of telecommunications and not to the activity itself.

We therefore proceed to an examination of the constitutional basis for jurisdiction over interprovincial telephone call rates and services. Such an examination, apart from perhaps helping to point to answers to certain very vexing constitutional questions, should also test the validity, in terms of the constitution, of the existing situation as described.

In constitutional discussions, we are dealing with matters which it is ultimately for the courts to pronounce upon (barring changes in the consti-

tutional provisions themselves). And it is always difficult to know how they will react. This is especially so in Canada where the exigencies of our federal system might well necessitate certain approaches to the law that cannot always be discerned from past cases.

In addition, the Supreme Court of Canada has generally stressed the supremacy of the factual context, especially in constitutional matters.⁷ In the matter at hand, the relevant decided cases are not entirely on point; few are recent; and it is not inconceivable that they might effectively be distinguished.

In relation to telecommunications, constitutional law has evolved over the last century through periodic responses by the courts to the development of new telecommunications techniques and needs. This process is likely to continue. Moreover with the numerous studies and the general report of the Telecommission, we probably now have the most thorough and significant canvass of telecommunications techniques and needs ever undertaken in Canada. If it has not answered all our legal questions, what it has done, in the facts it has gathered and the picture it has painted of telecommunications systems and technology, current and emergent, is provide an accurate factual basis for future legal arguments before the courts.

The approach in this analysis, therefore, is one which looks to the past for relevant substantive legal principles and for patterns of judicial behaviour, but it emphasizes the future - which is continuously becoming the present in this field of rapid technological change - for the factual contexts which the courts will be presented with, and which they will respond to in applying and thereby further developing constitutional law.

^{7.} Cf. The case of Attorney-General for Ontario v. Israel Winner, (1954) A.C. 541, hereafter Winner case, at p. 581, where Lord Porter stresses the point that the important question is "What is the undertaking which is in fact being carried on?"

III. The Division of Jurisdiction in Relation to Telecommunications in Constitutional Law

In the B.N.A. Act, the only direct reference to telecommunications is in the word "Telegraphs" in section 92(10)(a). Following the case of Toronto v. Bell Telephone Company, telephones can be assimilated to telegraphs.⁸

Section 92(10)(a) excepts from the exclusive powers of provincial legislatures:

" . . . Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."

In virtue of section 91(29), this class of subjects is brought within the exclusive legislature authority of Parliament.

Accordingly, for there to be federal authority to directly regulate interprovincial telecommunications rates and services, there would under section 92(10)(a) have to be the requisite work or undertaking extending beyond the limits of a province or connecting two or more provinces.

An undertaking, in the classic formulation of Lord Dunedin, is "an arrangement under which, of course, physical things are used."⁹

Let us turn to the matter of interprovincial telephone service, and choose as an example, which might be followed throughout the course of this analysis, the service between Winnipeg and Regina. On first glance, this might appear to be an arrangement, among the telephone companies concerned, under which physical things (i.e. their switching facilities, wires, cables, micro-wave towers, etc.) were used, and which "connected" Manitoba and Saskatchewan; in short, that it was an undertaking under section 92(10)(a).

8. (1905) A.C. 52, at p. 57. Hereafter Bell case.

9. In re Regulation and Control of Radio Communication, (1932) A.C. 304, at p. 315. Hereafter Radio Reference.

First appearances would, however, be deceiving. For there are two tests of interpretation which have evolved through past decisions of the courts and which must be applied in order to determine whether such an interpretation can be offered.

The first test involves the principle of the non-severability of the undertaking. Lord Macnaghten originally enunciated the principle in the Bell case as follows, referring to the undertaking of the Bell Telephone Company (as it then was):

" The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places."¹⁰

In a recent article, Professor Colin McNairn expressed the principle as follows:

" An undertaking cannot be broken down, so as to subject it to different legislative jurisdictions, into separate local and long-distance businesses when in fact the two types of operations are carried on as an integrated undertaking."¹¹

The effect of this principle is to prevent the severing of an "integrated undertaking", to direct us to examine it as a whole rather than in parts, and to require that it be consigned in toto to one jurisdiction or the other. The point is extremely important. Because if there is any principle which is relevant to the matter before us, it is this principle of non-severability,

10. Bell case, loc. cit. at p. 59.

11. McNairn "Transportation, Communication and the Constitution; the Scope of Federal Jurisdiction", (1969), XLVII Can. Bar Rev. 355, at p. 374.

which has proceeded virtually unscathed through nearly seven decades of court decisions in relation to undertakings in the transportation and communication fields. It is accordingly suggested that the courts are likely to reject any arguments which attempt to "sever the undertaking" by suggesting that while certain companies, such as the Manitoba Telephone System, may be provincially-regulated, their interprovincial services, or their long-distance services,¹² may be federally regulated. These services are offered by the various companies concerned, and make use of the same lines, wires and other facilities as their other services. As regards the Manitoba Telephone System, (which offers the Winnipeg-Regina service and which in this case is interchangeable with Saskatchewan Telecommunications), the Winnipeg to Regina service is part of its "integrated undertaking". It offers the service to its customers and uses for this service the same facilities that it uses for others (plus - by agreement - those of Saskatchewan Telecommunications). The service is thus inseparable, from a jurisdictional standpoint, from the company's other services.

The second problem, beyond the unity of the undertaking, is to determine the constitutional jurisdiction within which the total undertaking falls.

The question is, is the undertaking of the Manitoba Telephone System an undertaking falling within section 92(10)(a) of the B.N.A. Act and thus within exclusive federal jurisdiction? To answer that we must first determine whether it can be deemed to "connect" Manitoba with any other province (in this case Saskatchewan), or to "extend" beyond the limits of Manitoba. As Lord Porter stated in the Winner case, "the question whether there is an interconnecting undertaking is one depending on all the circumstances of the case."¹³ We must accordingly try and ascertain whether the factual context depicts, in

12. Cf. Ibid. at p. 392 for a suggestion that certain intraprovincial rates may be regulated as "ancillary" to regulating interprovincial ones, assuming the case for the latter can be made.

13. Winner case, loc. cit. at p. 582.

a manner which might be sufficiently convincing to the courts, the necessary "connection" or "extension".

The facts in this situation are that the Winnipeg to Regina long-distance toll service is offered to its customers as a regular advertised service by the Manitoba Telephone System, a provincially-incorporated telecommunications carrier. The "hardware"¹⁴ utilized for these calls is owned by the company and is the same hardware as is used for its other calls. The hardware system is located within the territory of Manitoba but "interconnects"¹⁵ at various points along Manitoba's borders so that messages can travel to their destinations beyond provincial boundaries (inter alia to Regina). Manitoba Telephone also owns the parts of the three Trans-Canada microwave networks in Manitoba as well as part of Telesat Canada which will provide a satellite link across Canada.

Lett J. in the case of British Columbia Power Corp. Ltd. v. A.-G. for B.C. et al, sets the stage for our examination as follows:

" It seems to me on a close examination of s. 92(10)a and the judgments in the Winner case and the Tank Truck Transport case that if the Court finds aspects of an undertaking which are interprovincial in the sense of connecting one Province with any other of the Provinces, or extending beyond the limits of the Province, then the whole undertaking has the character of an undertaking that connects or extends within the meaning of s. 92(10)a."¹⁶

Two points should perhaps be stressed here. One is that we are not dealing in symmetry. That is to say that just because a prima facie intrapro-

14. The hardware includes the wires, microwave relay towers, switching facilities and generally all the equipment, mostly though not entirely unmovable, required to carry on a telecommunications business. See Telecommission General Report, Chapter 10 for greater detail.

15. See ibid., chapter 13.

16. (1965) 47 D.L.R. (2d.) 683 at p. 715. Hereafter B.C. Power case. Cf. Prof. McNairn, op. cit. at p. 374: "It is clear that a work or undertaking falls in toto within federal authority if it has some interprovincial extensions in practice since the jurisdiction is referable to the work or undertaking as such and not the interprovincial features thereof. The presence of some interprovincial movement is sufficient to bring an undertaking as a whole under federal competence provided it is no mere subterfuge to escape Provincial control." This is perhaps as it should be since it is really local works which connect or extend beyond provincial limits that are subject to federal jurisdiction.

vincial undertaking with interprovincial aspects is a matter for federal jurisdiction, this does not mean that a prima facie interprovincial undertaking with intraprovincial aspects would become a matter for provincial jurisdiction. This is important in drawing conclusions from the jurisprudence.

The second point is that we are not dealing in quantities, but are looking only for interprovincial aspects (or "some interprovincial extensions" or "movement" in McNairn's words).

McLennan J. of the Ontario High Court provides us with what appears to have become quite a definitive statement here:

". . . 'undertaking' involves activity and I think that to connect or extend, that activity must be continuous and regular, but if the facts show that a particular undertaking is continuous and regular, as the undertaking is in this case, then it does in fact connect or extend and falls within the exception in s. 92(10) (a) regardless of whether it is greater or less in extent than that which is carried on within the Province."¹⁷

In that particular case, only 6% of the Ontario company's business was interprovincial with 94% being intraprovincial. The principle was affirmed even more dramatically in the case of Regina v. Cooksville Magistrate's Court, Ex Parte Liquid Cargo Lines Ltd.,¹⁸ where an Ontario trucking company's undertaking was deemed to be interprovincial even though only 1.6% of its loads were hauled to or from points outside Ontario, representing only 10% of its total mileage.

We must accordingly attempt to ascertain which interprovincial "aspects" are germane in determining whether an undertaking can be classified among the exceptions in s. 92(10)(a).

17. In re Tank Truck Transport Ltd. (1960) 25 D.L.R. (2d.) 161 at p. 172. Aff'd without reasons (1963) 36 D.L.R. (2d.) 636. Hereafter Tank Truck Transport case. Cf. Lett J., loc. cit. at p. 713-4.

18. (1965) 46 D.L.R. (2d.) 700. Hereafter Liquid Cargo case.

It is submitted that three are relevant. One pertains to the extra-provincial service provided by the company; the second relates to physical extension beyond the province; and the third to its relationship to a national system.

Turning to the first, we note developing through the related jurisprudence of the past decade a notion of "continuous and regular connection". Thus McLennan J. in the Tank Truck Transport case:

" . . . 'undertaking' involves activity and I think that to connect or extend that activity must be continuous and regular . . ."¹⁹

Lett J. followed this in the B.C. Power case,²⁰ and in the Liquid Cargo case, Haines J. characterized the Liquid Cargo Lines Ltd. trucking undertaking as interprovincial because it was clear that it provided extra-provincial service consistently whenever its customers applied for it. In his words:

" Viewed from the point of view of the applicant Company, it is clear that its customers are provided with extra-provincial service consistently and without interruption whenever they apply to the applicant for such service."²¹

Applying this principle to the Manitoba Telephone System, it is clear that it too offers a complete range of extra-provincial long-distance services to its customers continuously and on demand. It "connects" Manitoba with other provinces (and the U.S.) in virtue of these services. Moreover a large percentage of its revenues derive from interprovincial calls.

19. Loc. cit. at p. 172.

20. Loc. cit. at p. 713.

21. Loc. cit. at p. 704.

Examining the second interprovincial "aspect", viz. physical connexion, it might be noted that it was the view of Haines J. in the Liquid Cargo case that there was really no need for physical terminals outside the province in order to characterize the undertaking as interprovincial. In his words:

" If I find, as I do, that the applicant's operations as a whole constitute an undertaking connecting Ontario with any other or others of the Provinces, or extending beyond the limits of the Province of Ontario, the mere absence of a terminal outside Ontario does not render it a local undertaking."²²

Nevertheless, the jurisprudence would in general tend to indicate the need for an interprovincial physical "aspect".

Now it is pointed out by Professor McNairn that:

". . . it has never been suggested that the facilities for interprovincial and foreign calls provided by various Provincial telephone systems are enough to bring these systems under federal control, though both a physical connexion of wires and co-operative arrangements with extraprovincial systems are necessary."²³

This does not necessarily mean that such an argument based on interconnection at the border could not be made,²⁴ but perhaps it is not necessary to make it here.

Following the case of the Queen in Right of Ontario v. Board of Transport Commissioners,²⁵ we can conclude that if a provincial enterprise uses the lines of an interprovincial system, then the provincial enterprise will be regarded as interprovincial.

22. Ibid. at p. 705. Haines J. mentions that in the Tank Truck Transport case there had in fact been an extra-provincial terminal, but that McLennan J. had held this to be significant. It should be noted that this argument is different from the "time-delay" one which McNairn raises, where an undertaking is interprovincial even though extra-provincial installations, which are or are declared by corporate objects to be intended to be built, have not yet in fact been built. Here none are to be built at all.

23. McNairn, op. cit. at p. 386.

24. The "roads" cases, where roads meeting at the border are still deemed provincial can, I think, be distinguished. Moreover the B.C. Power case treated the fact that provincial power lines interconnected with a foreign power grid as very significant in characterizing B.C. Power's undertaking as interprovincial.

25. (1968) 65 D.L.R. (2d.) 425. Hereafter GO Transit case.

The Manitoba Telephone System, along with twelve other telecommunications carriers across Canada, has agreed to rent two satellite channels from Telesat Canada for the transmission, inter alia, of telephone messages. Manitoba will then be employing the lines of an interprovincial system for the transmission of its messages. While it is true that it will not employ these lines exclusively, the principle of "load-on-demand" will be in effect so that messages will be transmitted either through terrestrial or satellite channels, depending on which are free, and without the customers knowing how their messages are travelling. Thus the Winnipeg to Regina call, if terrestrial circuits between the two cities were occupied, could travel via satellite. What is more, Canadian telephone facilities are so linked up even today that that same call, if the direct Winnipeg-Regina circuits were occupied, might travel from Winnipeg to Toronto and then back across another microwave link-up to Regina. From the Ontario border to Toronto and back, Bell Canada facilities would have been employed, and the principle of the GO Transit case would again apply.

A final point about the "aspect" of physical extension that might be considered is that the extensive employment of microwave radiocommunication by the Manitoba Telephone System (and other Canadian companies) inevitably means that there is physical "spill-over" of waves beyond provincial boundaries. It was partly on the basis of this sort of "area of disturbance" reasoning that radiocommunication was implicitly conceded to be within federal jurisdiction under section 92(10)(a).²⁶

26. Radio Reference at p. 314-5.

The third interprovincial "aspect" concerns the possible relationship which a telephone carrier might have with a "national system".

The picture that emerges from the Telecommission studies is that of a Canadian telecommunications system, which provides a variety of services, including telegraph, telephone and teleprinting, through a variety of modes, including microwave relays, wires, cables and satellites. Looking at the telephone service in particular, we are or soon will be at the stage where messages will travel through a variety of modes in different directions across the country. The fact that part of the hardware of some of the modes are owned by the Manitoba Telephone System is becoming increasingly irrelevant. The point is that different messages are sent from, into, or through its facilities from and to different points in and out of Manitoba, and in this system its facilities play an integral role. The entire system is interconnected and interdependent and every company plays an essential part.

The reality of the hardware "infrastructure" is reflected in the intercorporate "superstructure", the complex web of arrangements and agreements among all the companies in the system. Eight of the largest in fact form the Trans-Canada Telephone System (T.C.T.S.), an association organized in 1931 "to design, build and operate a Canadian continent-wide network".²⁷ Through its coordination of the construction programs of its members, its revenue settlement arrangements and its planning function, it aims "to provide the necessary co-ordination and integration of Canada's telecommunications services on a national basis".²⁸ While this paper is not attempting to suggest a definitive answer to

27. Telecommission Study 2(i) "Study of Institutional Structure of Telephone Operating Industries", at p. 31.

28. Ibid. at p. 32.

the question of whether the T.C.T.S. could be regarded as an undertaking within the meaning of section 92(10)(a),²⁹ the organization both reflects and co-ordinates the interdependence of the Canadian system.

The Manitoba Telephone System, on the basis of its integral relationship to the Canadian telephone system, reflected in its membership in the Trans-Canada Telephone System, can on this basis perhaps also be considered to be a "connecting" and "extending" undertaking within the meaning of section 92(10)(a).

In addition to section 92(10)(a) of the B.N.A. Act federal jurisdiction over all telecommunication carriers could probably be based on the general power in the introductory paragraph of section 91. The argument could, it is believed, successfully be made that telecommunications does indeed go beyond local or provincial interests and concern to that of Canada as a whole.³⁰ In view of the integrated multi-modal and extensive Canadian telecommunication systems and facilities, and of the national goals which depend on these systems for their attainment, authority must be available to the Canadian government to regulate communications in pursuit of national goals.³¹ The increased resort to the general power in recent years would tend to support this head of federal jurisdiction.³²

On the basis, then, either of section 92(10)(a) or of the introductory paragraph in section 91, the Manitoba Telephone System, as well as Saskatchewan Telecommunications would be subject to exclusive federal jurisdiction, and the

29. It would, however, probably be so regarded were T.C.T.S. an operator of the interprovincial long lines in the manner of the American Telephone & Telegraph Co. in the U.S.

30. Cf. Johannesson v. West St. Paul (1952) 1 S.C.R. 292, and In re Regulation and Control of Aeronautics, 1932 A.C. 54 for statements of the "national dimensions" test.

31. These goals would include the elimination of regional and information disparities among Canadians, the development of remote areas and the assertion of Canadian sovereignty in the far-flung reaches of the country, to name just a few.

32. See A. S. Abel, "What Peace, Order and Good Government?" (1968) 7 West. Ont. Law Rev. 1.

Winnipeg to Regina calls could accordingly be regulated federally.³³ Moreover, it is suggested that the same reasoning as applies to the companies serving Winnipeg and Regina also applies to the ones serving St. John's and Moncton.³⁴ As regards the companies serving Toronto and Vancouver, the same reasoning would again apply. These are of course already subject to federal jurisdiction.

It is accordingly the conclusion of this brief that the major telephone companies in Canada are subject, in regard to both their interprovincial and their intraprovincial rates and services, to the exclusive jurisdiction of Parliament.

33. There is under the constitution a third head of jurisdiction in virtue of which the facilities of the Manitoba Telephone System (*inter alia*) could come under federal jurisdiction. This is section 92(10)(c) whereby works may be declared by Parliament to be for the general advantage of Canada or two or more of its provinces. The works of Bell Canada and of the B.C. Telephone Co. have in fact been so declared.

The problem of course with such a unilateral declaration is not legal but rather political. Although employed 470 times since Confederation, the declaratory power has not been employed for over a decade now. Reliance on it now as the primary basis for federal jurisdiction might be regarded as politically unjustified. Even in the cases of Bell and B.C. Tel. (which declarations were made in 1882 and 1916 respectively) it has been argued that the declarations were "secondary", invoked in order to make doubly sure of a jurisdiction whose original basis lay in the interprovincial objects of both companies.

34. In fact the case for federal jurisdiction over the latter companies is even stronger in virtue of their corporate control and ownership.

Moncton, for example, is served by the New Brunswick Telephone Co. which is 51% owned and which is controlled by Bell Canada.

Thus, while corporate control is by no means sufficient to determine constitutional jurisdiction, the fact of Bell control over N.B. Tel. could be regarded as additional evidence of the two companies constituting a single connecting undertaking. The same would probably apply to the three other maritime companies as well.

(It should be noted that the question of control is quite separate from that of incorporation, which is not relevant to the question of jurisdiction. Thus while the Manitoba Telephone System, N.B. Tel. and certain other carriers are incorporated under provincial charters, this incorporation power does not of itself confer legislative authority on the incorporating jurisdiction to regulate the corporation's functional activity).

TELECOMMUNICATIONS



A red background with the words "TELECOMMUNICATIONS" and "TELEVISION" repeated in white, tilted diagonally. A small, dark rectangular stamp is positioned in the lower right area.

Study 1(b)

History of Regulation and Current Regulatory Setting

TELECOMMISSION

STUDY 1 (b)

HISTORY OF REGULATION AND
CURRENT REGULATORY SETTING

SUBMITTED BY

TRANS-CANADA TELEPHONE SYSTEM

MARCH 1970

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INTRODUCTION & GENERAL

Alexander Graham Bell first disclosed his concept of the telephone set in July, 1874 and wrote the patent specifications during 1875. The first working model of the telephone was completed in 1876. The birth of the telephone industry may be said to date from August 10, 1876, when Mr. Bell made the world's first long distance telephone call from Brantford to Paris, Ontario.

The first commercial developments of the telephone were made by telegraph companies which had signalling systems connected by wires to central offices in various urban areas in Canada. One of these, the Hamilton District Telegraph Co., began to replace its signalling boxes with telephone sets with the result that it came to operate the first telephone exchange in Canada early in 1878. The Bell family interests were first handled by the Dominion Telegraph Company, which opened its first exchange in Montreal early in 1879. The Bell Telephone Company of Canada was incorporated by Special Act of the Parliament of Canada on April 29, 1880, and the history of the telephone industry in Canada, particularly in the earlier years, has been closely related to the development of this Company.

The Bell Telephone Company of Canada immediately began to purchase telegraph companies which were providing telephone service and to expand the scope of their operations. The stated intention of the Company shortly after its incorporation was to provide service in all parts of Canada except British Columbia and this it proceeded to do. Of necessity, service was first

provided in the more densely populated areas where larger numbers of subscribers could be obtained without the expense of providing lengthy wire connections.

During the period between 1880 and the turn of the century, The Bell Telephone Company of Canada established service in all urban centers of any size and also established trunk line connections between the larger centers. It was unable, however, to provide service in many rural areas because of the excessive cost. This led to the setting up of many small telephone systems and companies to meet the demand in particular areas where The Bell Telephone Company of Canada did not operate.

It was soon found that raising the capital required to provide telephone service in various parts of Canada required the participation and co-operation of residents of the areas involved. This led to the formation of local companies in the Maritime Provinces to which The Bell Telephone Company of Canada sold its plant. This was done in Prince Edward Island in 1885, in Nova Scotia in 1888 and in New Brunswick in 1889.

In the west, the rural nature of the country, the long distances involved, and the sparseness of the population provided even greater difficulties and led to the entry of Provincial Governments into the field. This was done with the intention of providing service to all who demanded it, whether located in urban or rural areas. The Bell Telephone Company of Canada sold its plant to the Governments in Manitoba and Alberta in 1908 and in Saskatchewan in 1909.

The major telephone companies and provincial systems have expanded their networks during the years by the acquisition of many of the small independent telephone systems, but there still remains a large number of these. At the end of 1968, there were 1,772 telephone systems of various types listed by the Dominion Bureau of Statistics as operating in Canada and they had 8,817,846 telephones in service. These systems are broken down as follows:

	<u>Telephones</u>
Federal Systems	1 37,200
Provincial Systems	10 1,136,303
Municipal Systems	30 282,537
Incorporated Companies	109 7,276,968
Co-operatives	1,615 83,339
Partnerships	1 61
Sole Proprietorships	6 1,438

The end of the Second World War marked the beginning of an era of greatly increased activity in Canada's north, particularly in the fields of defense, mining and energy. This in turn led to demands for telephone service in these distant areas and resulted in Bell Canada expanding its operating territory into Labrador and the Northwest Territories. Similarly, the government systems in the west and British Columbia Telephone Company have steadily extended their communications coverage northward to meet service requirements in these developing regions.

CANADIAN TELEPHONE INDUSTRY ORGANIZATIONS

The best known of these organizations is the Trans-Canada Telephone System, formed in 1931 by seven major telephone organizations. Its aims are to develop and maintain an all-Canadian coast-to-coast long distance network and establish uniform operating procedures to speed the handling of long distance traffic. Today there are eight full members of the system and one associate member:

Newfoundland Telephone Company Limited

Maritime Telegraph and Telephone Company, Limited

The New Brunswick Telephone Company, Limited

Bell Canada

Manitoba Telephone System

Saskatchewan Telecommunications

Alberta Government Telephones

British Columbia Telephone Company

The Canadian Overseas Telecommunication Corporation is an associate member.

Members of the Trans-Canada Telephone System work together in a nationwide business. They provide a complete network capable of carrying a diversity of communications -- television and radio programs, data and defense communications, as well as regular telephone traffic between the Atlantic and the Pacific. Working in concert, each member provides the telephone plant within its own territory and shares in the revenues from communications carried into, out of, or across its territory.

The Trans-Canada network is available to every telephone system in Canada through the facilities of one of the member companies. Via the Canadian

Overseas Telecommunication Corporation, telephone companies across the country can also route calls to overseas points.

An organization of a somewhat different character, the Telephone Association of Canada was formed in 1921 to promote co-operation and the interchange of technical and operating information within the telephone industry. In addition to the eight members of the Trans-Canada Telephone System, five other companies belong to the association:

Québec-Téléphone

edmonton telephones

The Island Telephone Company, Limited

Northern Telephone Limited

Ontario Northland Communications

The need for sharing technical and operating information is great. The telephone industry is expanding and diversifying at a rapid pace and technology makes new advances each year. Through the Telephone Association of Canada, the experience of others in the industry is made readily available to all members. This greatly eases the adjustment to new techniques and developments.

Other Canadian telephone systems also see the benefits of associating with their fellow members in the industry. Many such systems have formed groups, such as the Canadian Independent Telephone Association, the Québec Independent Telephone Association, the Ontario Telephone Association, and the Saskatchewan Association of Rural Telephone Companies, all with aims basically similar to those of the Telephone Association of Canada.

Co-operation within the industry extends further than the mere creation of groups. Nine major telephone organizations have service agreements with Bell Canada through which they can obtain advice and assistance on both technical and operating matters for an annual fee. Bell Canada has a similar agreement with the American Telephone and Telegraph Company in the United States, which gives it the benefit of the latest information from below the border as does British Columbia Telephone Company with General Telephone & Electronics Corporation.

Again many of the smaller telephone systems receive advice and assistance from larger companies. Bell Canada maintains close liaison with about 200 telephone companies and systems in Ontario and Quebec. Meetings are held to discuss matters of mutual interest; training courses are offered to employees of many smaller companies, and the latest information about the industry is specially prepared for them.

The aim of the larger systems is to assist the smaller companies to operate as efficient and prosperous enterprises. Efforts in this direction are amply justified by the improved long distance service all customers enjoy as a result and by the general increase in business that good service encourages. Co-operation and mutual assistance produce better quality service which, in turn, generates a demand for the services the telephone industry provides.

HISTORICAL OUTLINE OF DEVELOPMENT OF REGULATION

The regulation of telephone service in Canada finds its roots in British railway law, as the development of telegraph service in Britain was closely associated with the railway system.

In Canada, regulation of telephone service has been undertaken at the federal, provincial and municipal levels. The first general federal legislation with regard to telephones was enacted with the passing of the Railway Act of 1906. The development of federal regulation is outlined in the histories of the British Columbia Telephone Company and Bell Canada in Appendix A.

Provincial legislation with regard to telephones has been enacted by all Provinces; the various statutes are listed in the Bibliography and discussed in the histories of the provincially organized companies and systems in Appendix A.

In an attempt to obtain a comprehensive view of operating and regulatory environments in Canada, the members of the Trans-Canada Telephone System have each provided an individual history. The companies and systems providing the histories are as follows:

Newfoundland Telephone Company Limited

Maritime Telegraph and Telephone Company, Limited
and The Island Telephone Company, Limited

The New Brunswick Telephone Company, Limited

Bell Canada

Manitoba Telephone System

Saskatchewan Telecommunications

Alberta Government Telephones

British Columbia Telephone Company

CURRENT REGULATORY SETTING

ECONOMIC

Two members of the Trans-Canada Telephone System operate under federal jurisdiction, Bell Canada and British Columbia Telephone Company.

This jurisdiction is exercised by the Canadian Transport Commission and flows from the Special Act of Incorporation of each company and the Railway Act.

It is mainly one of approving just and reasonable telephone rates and charges, free from unjust discrimination or undue preference. There is no statutory definition of the criteria to be used by the Commission in testing the justness and reasonableness of rates and varying tests have been utilized at different times.

The Commission also has jurisdiction over the sale or other disposition of capital stock; connections and contracts with other telephone systems; and granting leave to construct outside plant across railways.

The six remaining T.C.T.S. members operate under provincial jurisdiction administered in all cases but that of Saskatchewan Telecommunications by an administrative board or commission. Saskatchewan Telecommunications reports directly to the government of its Province.

The reasonableness of telephone rates of provincially regulated telephone companies in Newfoundland, Nova Scotia, Alberta and British Columbia is tested by formulas making use of the rate of return on a rate base calculated on a valuation of plant in service plus allowances for such items as working

capital. In New Brunswick, Quebec and Manitoba rates must be just and reasonable, with no test specified, but in the latter Province there is an enumeration of specific factors which must be taken into consideration. In Prince Edward Island the test is the rate of return on a rate base to be fixed by the regulatory authority. Ontario uses return on capital investment for the larger telephone systems and, for municipal systems, rates must be sufficient to meet payments of principal and interest on debentures. The test of rates of rural telephone systems in Saskatchewan is that they be sufficient to pay operating and other costs.

TECHNICAL

Federal legislation also affects those operations of telephone companies which make use of the radio frequency spectrum which include many local and long distance services. Other typical services carried by radio are video, data, land, marine and aeronautical mobile, remote audio broadcasting and TV pickups, paging and facsimile.

The first regulation with regard to radio in Canada came with the passing of the Radio Telegraph Act in 1913. This was succeeded by the Radio Act of 1938. The scope of regulation has paralleled advances in technology relating to radio communications. Administration was first under the Department of Naval Services, then under the Department of Transport and has now been transferred to the new Department of Communications. The Department encourages the parties concerned to resolve, by mutual agreement, problems relating to the allocation and use of the radio frequency spectrum. It is also responsible for the administration, nationally, of international arrangements relations to the management of the spectrum.

The operations of telephone systems are also regulated in part with regard to the location of plant by federal statutes and departments. In case of lines crossing navigable waters, the Navigable Waters Protection Act must be complied with. This is administered by the Department of Transport either directly or through agencies such as the St. Lawrence Ship Channel Authority or the National Harbours Board. Crossings of railways under federal jurisdiction must comply with the Railway Act as administered by the Canadian Transport Commission and there is similar legislation with regard to provincial railways. Crossings of oil and gas pipe lines under federal jurisdiction must comply with the National Energy Act as administered by the National Energy Board. Crossings of roads and highways involve dealing with the various provincial departments of roads or highways or municipal authorities, in addition to the Canadian Transport Commission. More detailed discussion of provincial technical regulation is found in the individual histories in Appendix A.

APPENDIX A

NEWFOUNDLAND TELEPHONE COMPANY LIMITED

The Anglo-American Telegraph Company inaugurated the first telephone exchange in St. John's, Newfoundland, in 1895.

In 1919, Anglo-American sold its business to the Western Union Telegraph Company. On May 31, 1919, The Avalon Telephone Company, Limited was incorporated and took over the telephone plant and rights of the Telegraph Company. At that time there were 800 telephones operating in the city; at December 31, 1968 the total number of telephones operating in Avalon's system had reached 82,645.

For thirty years Avalon conducted its business without formal regulation but in conformity with various acts passed by the Government of Newfoundland. In 1949, shortly after Newfoundland became a Province of Canada, the Board of Commissioners of Public Utilities was appointed and Avalon came under the jurisdiction of this body. In 1962, The Bell Telephone Company of Canada made an offer to the shareholders of Avalon and acquired 99% of the Ordinary Shares. On January 1, 1970 the name of the company was changed to Newfoundland Telephone Company Limited.

OPERATING TERRITORY

Telephone service on the Island of Newfoundland is supplied by two companies - Newfoundland Telephone Company Limited and Canadian National Telecommunications. The territory served by Newfoundland Telephone Company Limited includes all of the Avalon Peninsula, part of the Burin Peninsula, part of Central Newfoundland (Grand Falls - Pointe Leamington) and the

West Coast from Deer Lake to Rose Blanche. Most of these areas were originally franchised and take in most of the more populated parts of the Island. The Government of Canada acquired the system belonging to the Newfoundland Postal Telegraphs in 1949 and appointed Canadian National Telecommunications to take over its operations. This Government-owned branch of the Post Office had begun to connect their offices by telephone and supply some service on a rural line basis. C.N.T. has carried out a program of modernization and expansion, and at the end of 1968 had some 23,000 telephones in use. C.N.T. built and maintains the main microwave system from St. John's to Sydney, N.S.

Bell Canada and the Labrador Telephone Company (formerly the Newfoundland and Labrador Telephone Company) operate in the Labrador section of the Province the former with 7,074 telephones and the latter with 2,958 telephones at December 31, 1968.

All four systems thus interconnect 115,677 telephones within the Province.

On January 10, 1939 a radio telephone link was established between St. John's and Montreal, giving the Island its first telephone connection to the rest of the world. Since then Newfoundland Telephone Company Limited has made use of leased facilities, both cable and microwave and had 131 circuits to the Canadian mainland at December 31, 1968. These are on diversified routes; by the main microwave system built and operated by C.N.T. from Red Rocks, Newfoundland to Cape North, Nova Scotia; Port-aux-Basques to Sydney, N.S., Corner Brook to Grosses-Roches, Quebec, and to L'Anse-au-Loup,

Blanc Sablon and Goose Bay in Labrador. Another route -- Clarenville -- Sydney is being re-established in TAT 1 cable.

REGULATION

The Public Utility Act in 1964 and Amendment 1966 thereof applies only to public utilities that are subject to the legislative authority of the Province and gives the Board power to regulate in such matters as (1) Rates, (2) Issue of Capital, (3) Construction Expenditures, (4) Rate Base and Rate of Return, (5) Rate of Depreciation, (6) Forms of Record, (7) Adequacy of Service. Newfoundland Telephone Company Limited and Labrador Telephone Company are regulated by the Provincial Authority while Canadian National Telecommunications comes under the jurisdiction of the Canadian Transport Commission.

In matters referred to the Board of Commissioners of Public Utilities, through petition or otherwise, hearings are held and orders issued after consideration of evidence by the Board.

MARITIME TELEGRAPH AND TELEPHONE COMPANY, LIMITED

In 1878 the Dominion Telegraph Company installed the first telephone on a commercial basis at Halifax. A year later the Western Union Telegraph Company also opened a telephone office in Halifax serving notice that it was prepared to supply telephone service to the public. In July of 1880 the Bell Telephone Company of Canada, then organized as a corporate entity only three months, purchased the plant and rights of the Dominion Telegraph Company. A similar purchase of the Western Union interest was made in 1881.

In May, 1887, the Nova Scotia Telephone Company was incorporated under the laws of Nova Scotia. This company was specifically incorporated for the purpose of supplying telephone services to the Halifax area and over as great an area of the rest of the province as was practicable. In 1888 this company purchased the Bell Telephone Company's undertaking, both in Nova Scotia and New Brunswick, only to sell the New Brunswick interest back to Bell the following year.

Between 1887 and 1911 the Nova Scotia Telephone Company continued to expand its telephone services throughout Nova Scotia, acquiring the plant and undertaking of several privately incorporated telephone companies in the process. These independent companies, one of which was incorporated as early as 1885, were established on a purely local basis to supply local service only. In early 1910 Maritime Telegraph and Telephone Company, Limited was incorporated with head office at Halifax. This company immediately commenced to purchase the undertakings of several privately incorporated telephone companies in the Province, as well as to initiate negotiations with the

Nova Scotia Telephone Company with a view to purchasing or leasing the company's entire telephone system throughout the Province of Nova Scotia. On July 1, 1911, Maritime Telegraph and Telephone Company, Limited purchased the entire undertaking of the Nova Scotia Telephone Company, thus consolidating the major telephone systems in the Province under the company's name.

Since its incorporation, Maritime Telegraph and Telephone Company, Limited has steadily expanded its telephone services and plant in the Province. By 1916 the number of telephones operated by the company exceeded 20,000. The first dial central office came into service in Halifax in February of 1921, and in 1929 and 1930 direct long distance circuits were opened to Boston and Montreal. Following the depression years the number of telephones expanded rapidly exceeding 100,000 by 1950. Long distance cable was established during these years linking various parts of the Province along with such other technical advances as dial service, radio links and later microwave radio link. Authorized corporate capital was increased from \$15,000,000.00 to \$25,000,000.00 in 1953, and in 1961 increased two-fold to \$50,000,000.00.

From the time of its incorporation Maritime Telegraph and Telephone Company, Limited became subject to the broad regulatory control of the Board of Commissioners of Public Utilities for the Province of Nova Scotia. The first Public Utilities Act was enacted by the Nova Scotia Legislature in 1910, but this Act, combined with an earlier statutory requirement that all telephone toll schedules be filed with the provincial secretary, proved to be an ineffective method of regulating telephone services and other public utilities. The Public Utilities Act of 1913 corrected the

situation, creating a Board with broad and effective regulatory powers over all public utilities carrying on business in the Province, including Maritime Telegraph and Telephone Company, Limited.

Over the years numerous private and rural telephone companies in the Province have been purchased by Maritime Telegraph and Telephone Company, Limited while others, with the approval of the Board of Commissioners of Public Utilities, have abandoned the service of their respective territories. With the approval of the Board, Maritime Telegraph and Telephone Company, Limited has been permitted from time to time to enter these mostly rural districts to provide telephone service.

Except for the ultimate control of government, the regulatory powers of the Board of Commissioners of Public Utilities and the limitations set out in its own act of incorporation, the management and board of directors of Maritime Telegraph and Telephone Company, Limited have free and complete control over the management and business policy of the company.

The company's Act of Incorporation gives it power to operate wireless telephone and radio-telephone systems as well as to provide and furnish services and facilities for the transmission of intelligence, sound, television, pictures, writing or signals. In addition to telephone services the company presently provides services to independent bodies in transmitting television signals over its microwave facilities and co-axial cable facilities. In 1966, when Bell Canada acquired a controlling interest in Maritime Telegraph and Telephone Company, Limited, the Nova Scotia Legislature amended the company's Act of Incorporation to limit the voting power of any shareholder to a maximum of 1,000 shares. A private Act passed in 1912, relating to the Act of

Incorporation, specifies the right of Bell Canada to nominate and appoint two directors to the board of Maritime Telegraph and Telephone Company, Limited so long as Bell shall own at least 10,000 shares in the capital stock of the company.

As of December 31, 1969, Maritime Telegraph and Telephone Company, Limited had 269,211 telephones in service.

CORPORATE RELATIONSHIPS

The capital stock of Maritime Telegraph and Telephone Company, Limited is subject to private ownership. The only shareholder owning over 10% of the company's shares is Bell Canada which holds 52.4% of the common shares and 5.9% of the preferred. This direct ownership by Bell is without voting control, due to the previously mentioned 1966 amendment to the company's Act of Incorporation by the provincial government.

The company purchased the outstanding shares of the Telephone Company of Prince Edward Island in 1910. The Island Telephone Company Limited acquired the undertaking formerly owned by the Telephone Company of Prince Edward Island through private statute in 1929 with the Maritime Telegraph and Telephone Company, Limited presently owning 56% of the capital stock of Island Telephone. Island Telephone is an operating company only and has no subsidiaries of its own of any kind. It is discussed more fully at page 21 herein.

Cable Vision Services (Nova Scotia) Limited is a wholly owned subsidiary of Maritime Telegraph and Telephone Company, Limited. This operating company provides television transmission service to an independent Nova Scotia firm.

OPERATING TERRITORY

Maritime Telegraph and Telephone Company, Limited was originally incorporated for the purpose of carrying on business in the Maritime Provinces. In actual fact it has confined its operations to the Province of Nova Scotia, although no territorial restrictions are laid down in its Act of Incorporation. The company's actual operations cover substantially the whole of the Province. Private telephone companies, as well as those incorporated as mutuals under the Rural Telephone Act, serve an ever decreasing area of the Province. In recent years more and more of the mutual companies have, with the approval of the Board of Commissioners of Public Utilities, abandoned their respective territories, and service in those territories has then been provided by the company. In 1968 alone, ten mutual telephone companies abandoned their respective rural districts, with the Board permitting the company to enter the abandoned rural districts to give telephone service. In very few exchanges the company has provided services overlapping that of connecting companies, but always with the approval of the Board of Commissioners of Public Utilities.

REGULATION

The present regulatory authority for the company is the Board of Commissioners of Public Utilities for Nova Scotia operating under the Public Utilities Act. The Board consists of three commissioners including a chairman, and vice-chairman, appointed by Governor-in-Council, all of whom hold office until the age of 70 years, unless directed otherwise by the Governor-in-Council. The Board's powers stem from the 1913 Public Utilities Act patterned to a large extent on the Act Establishing the Board of Railway Commissioners in Wisconsin in 1907. The 1913 Act greatly expanded the

jurisdiction, powers and stature of the Board. It contained 97 sections and many of these sections can be found unchanged, in the present Public Utilities Act. Since 1913 there have been a number of amendments to, and consolidations or re-enactments of, the Act, although amendments since 1943 have been minor and infrequent.

Almost every provision of the Public Utilities Act for the Province deals with the regulation of telephone communication, either directly or indirectly. The Board, under the Act, is given broad jurisdiction to regulate the company as a public utility, both in technical and economic matters. Section 17 of the Public Utilities Act sets out the general supervisory powers of the Board:

"The Board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by the said public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfill its duties."

The Board has had since 1909, and continues to have, control and regulation over the following items of the company's business: expenditures on capital construction; rates of depreciation; accounts; rates, tolls and charges; issuing of securities and valuation of company property. Under the terms of the Public Utilities Act, as interpreted by the Board, Maritime Telegraph and Telephone Company, Limited is permitted to earn after payment of operating expenses (including depreciation and all taxes) a reasonable return on rate base as determined by the Board. In considering the reasonableness of return, the Board looks at capital structure, rate of return on the components of the capital structure, the rate of return on such components in other business enterprises, including public utilities, corporate

financing, financial need, ability to finance, operating efficiency and effectiveness, adequacy of service, economic and other factors.

All applications involving an increase in any rate and many applications for rate reductions are by public hearing after public notice.

The Board has power to make rules and regulations for the erection, construction, maintenance and repair of all poles and pole lines, specifying the type, quality and dimensions of such poles and cross arms and other equipment to be attached to them and including regulations over the stringing, construction, maintaining and repairing of all wires including drop and service wires. The Board is guided in the drafting of these and regulations by what it deems to be in the public interest. It has the further authority to require every public utility to bring such equipment into conformity with such rules and regulations.

The facilities offered by the public utility must be reasonably safe and adequate for the protection of the public. The Board has a broad investigatory jurisdiction conferred by the Public Utilities Act which enables it to check the adequacy of utility facilities from time to time. No public utility is entitled to make any extension to or changes in its line, plant and systems which are likely to be detrimental to the service supplied to any other public utility without first giving notice to that other public utility. In the event of disagreement the Board of Commissioners of Public Utilities will determine the matter after hearing the parties concerned.

S. 66(1) of the Public Utilities Act for Nova Scotia provides that:

"A public utility that owns, operates
manages or controls, or is incorporated
for the purpose of owning, operating,
managing or controlling any plant or
equipment for the conveyance of telephone
messages either directly or indirectly to
or for the public shall not at any time
change the type of equipment installed in
any of its exchanges without first
obtaining the approval of the Board."

Such approval may be given *ex parte* or after public hearing if
the Board determines that such a hearing is merited in the circumstances.

OTHER REGULATORY AND QUASI-REGULATORY INFLUENCES

The Board of Commissioners of Public Utilities is the only
regulatory agency affecting the operations of Maritime Telegraph and Telephone
Company, Limited other than the limitations and controls laid down by its
own Act of Incorporation. Certain sections of the incorporating Act give
indirect regulatory authority to Councils of incorporated cities and towns
by obliging the company to comply with certain directions when erecting,
constructing or maintaining poles, wires or cables in these areas.

THE ISLAND TELEPHONE COMPANY LIMITED

The Telephone Company of Prince Edward Island, which later became
the Island Telephone Company, Limited was incorporated by the Legislature
of Prince Edward Island in 1885, just nine years after the invention of the
telephone. This company gradually built up a telephone system more or less
covering the whole of Prince Edward Island. In 1910, when Maritime Telegraph
and Telephone Company, Limited was incorporated for the purpose of consol-
idating all the telephone companies of Nova Scotia and bringing their plant
up to the most modern requirements, negotiations were undertaken with the
Telephone Company of Prince Edward Island with the object of getting that

company to modernize its system, so as to be able to take advantage of telephone cable connections between Prince Edward Island and Nova Scotia which the Maritime Telegraph and Telephone Company, Limited proposed to establish.

However, due to lack of capital, the Island Company was unable to make necessary plant improvements. Maritime Telegraph and Telephone Company, Limited at this point began serious negotiations to purchase the then outstanding shares of the Telephone Company of Prince Edward Island, realizing that it would not be possible to give the public satisfactory telephone communications between the Island and other parts of North America until the Island Company's plant was entirely rebuilt and modernized. In 1910 Maritime Telegraph and Telephone Company, Limited was unsuccessful in purchasing the majority of the shares of the Telephone Company of Prince Edward Island and immediately set about expending large sums of money for modernizing and up-dating the telephone system on Prince Edward Island.

In 1921, for various reasons, it was found desirable to incorporate a Federal Company, known as the Eastern Telephone and Telegraph Company Limited, the shares of which were owned by the Maritime Company. The Telephone Company of Prince Edward Island's property was then transferred to the Eastern Company and continued to be operated under that company's name. To facilitate American Telephone and Telegraph Company Limited's desire to lay submarine telephone cables across the Atlantic the Maritime Company decided to sell the Eastern Company's charter to it for a nominal figure. Before this was done it became necessary to divest the Eastern Company of its property; thereupon it petitioned the Prince Edward Island Legislature for the incorporation of The Island Telephone Company, Limited in 1929.

Since the incorporation of this company every effort has been made to maintain the most modern telephone plant and equipment on the Island in order to provide the most effective and satisfactory service possible to the public.

As of December 31, 1969, The Island Telephone Company, Limited had 32,314 telephones in service.

CORPORATE RELATIONSHIPS

The only majority or substantial holder of common shares in The Island Telephone Company, Limited is Maritime Telegraph and Telephone Company, Limited which owns 56% of such capital. The Island Telephone Company, Limited has no subsidiary companies, whether operating or otherwise, nor does it have any affiliated companies through which it carries on any of its operations.

OPERATING TERRITORY

The Island Telephone Company, Limited's operating territory is the whole of the Province of Prince Edward Island, although its charter of incorporation places no limits on the geographical bounds of its actual operations. Actual operations cover almost all of the Province except for areas serviced by a small and ever decreasing number of privately owned telephone companies. Section 3 of the Act of Incoporation granted the company the sole and exclusive right to construct, operate and maintain a telephone system in Prince Edward Island from 1929 until 1939, subject to the rights and privileges enjoyed by rural telephone lines.

REGULATION

The Public Utilities Commission Act does not in itself attempt to regulate public utilities in detail. While it provides for a Public Utilities Commission, consisting of three Commissioners, the Act concerns itself mainly with the general organization and jurisdiction of the Commission leaving the specific items to be regulated by it to the terms of the Electric Power and Telephone Act, as far as communications are concerned. In the most general phraseology, Section 9 of the Act obligates the Commission to exercise powers of general supervision over all public utilities and to make all necessary examinations and inquiries to assure itself that all public utilities in the Province are complying with the Act. Any person incorporated for the purpose of owning, managing or operating any plant or equipment for the conveyance of telephone messages is deemed to be a public utility. The Commissioners, one of whom may be a judge of the Supreme Court of Prince Edward Island, or a judge of one of the County Courts, are appointed by the Lieutenant-Governor-in-Council.

The Commissioners are obliged to exercise such powers and jurisdiction as are conferred on them by any other Provincial statute. Their principal functions are determined by the terms of the Electric Power and Telephone Act. This Act governs public utilities which own, operate, manage or control, plant or equipment for the conveyance of telephone messages or for the production, transmission or furnishing of electric energy. The Public Utilities Commission, as appointed under the Public Utilities Commission Act, enforces the provisions of the Act.

Public Utilities in the field of communications (as specifically limited to telephone services by the Act) must furnish reasonably safe and adequate service at all times. The height of poles is subject to regulation by the Commission. To ensure a reasonable degree of service, as well as an efficient operation, no public utility in the Province may install any equipment, fixtures or appliances which are not of a uniform design and the product of a standard manufacturer, without the consent of the Commission. The Commission also has the regulatory power to allow overlapping telephone services and installation of equipment and plant on the basis of present or future public convenience. This body also ensures that no telephone company places any of its poles, conduits or wires in such a manner as to interfere with equipment of other companies engaged in the same business.

Section 96 of the Electric Power and Telephone Act provides:

"Every public utility shall be entitled to earn annually such return as the Commission considers just and reasonable, computed by using the earnings base as fixed and determined by the Commission for each type of service furnished, rendered or supplied by such public utility, and such return shall be in addition to such expenses as the Commission may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the Commission according to this Act and the rules and regulations made by the Commission thereunder."

Rates are regulated on the basis of the company's fiscal requirements measured by the rate of return earned on the rate base fixed by the Commission. Capital construction over \$1,000.00 cannot be proceeded with except with the approval of the Commission. Section 10 of the Act forbids a public utility in Prince Edward Island from selling, assigning or transferring

the whole or any part of its undertaking to any other person without first receiving the Commission's approval. Detailed annual accounts must be submitted to the Commission by every public utility carrying on business on the Island, setting forth the utility's authorized and paid up capital, its assets and liabilities, its receipts and expenditures for the previous year, its dividends paid or declared and such other information as may be required by the Commission. Regulation over annual rates of depreciation and valuation of utility assets are also vested in the Commission by Sections 22 and 28 of the Electric Power and Telephone Act.

The exercise of the Commission's regulatory jurisdiction over public utilities may be initiated by the Commission itself under particular sections of the Electric Power and Telephone Act, or under its broad investigatory powers into any matter relating to any public utility as set out in the Electric Power and Telephone Act and the Public Utilities Commission Act. The determination of any issue may or may not be heard at public hearing, at the Commission's discretion. Section 15 of the Public Utilities Act allows any public utility aggrieved by any decision or order of the Commission to appeal to the Prince Edward Island Supreme Court in Banco, except as otherwise provided in any statute or regulation.

THE NEW BRUNSWICK TELEPHONE COMPANY, LIMITED

The New Brunswick Telephone Company, Limited was incorporated by a Special Act of the Legislature of the Province of New Brunswick, entitled "An Act to Incorporate the New Brunswick Telephone Company (Limited)", being chapter 78 of the Acts of Assembly of the Province of New Brunswick on April 6, 1888.

The total number of telephones in service as of December 31, 1968 was 206,507.

CORPORATE RELATIONSHIPS

The New Brunswick Telephone Company, Limited does not have any subsidiaries, operating or otherwise. Bell Canada, as of June 30, 1969, held approximately 51% of the issued and outstanding stock of the company.

OPERATING TERRITORY

The company is authorized to construct, operate and maintain telephone lines and provide telephone service, provide and operate wireless telephone and radio telephone systems and provide and operate services and facilities for the transmission of intelligence, sound, television, pictures, writing or signals within the Province of New Brunswick.

The company provides the above mentioned services to all areas of the Province excepting a very small portion of Madawaska County in the north-western section of the Province. This portion of the Province is served by the Fort Kent Telephone Company which is a subsidiary of Continental Telephone Company. The area serviced by that company is approximately twenty square miles and consists mainly of rural communities.

REGULATION

The activities of the company are regulated by the Board of Commissioners of Public Utilities of the Province of New Brunswick under the authority of the Public Utilities Act.

The Board of Commissioners of Public Utilities of the Province of New Brunswick appears to have its power vested in its authority to determine the "justness and reasonableness" of the company's rates and charges. The Act does not explicitly give the company the right to earn a reasonable rate of return by Section (6) (3) does state:

"The Board shall take into consideration the reasonableness of the rate of return to the public utility upon its investment."

The Public Utilities Board in all major rate increases proposed in past years have hired independent auditors to prepare and submit data relevant to the company's application and to examine the company's records to determine whether or not the company has maintained its records in a consistent manner and in accordance with established telephone accounting procedures. They also calculate (using a "test year") an annual rate of return figure under both the existing and proposed tariffs using a defined net assets rate base.

This net assets rate base essentially consists of the investment in fixed assets valued at historic costs determined from the company's accounting records plus a calculated amount of working capital. From this is deducted the accumulated depreciation on these fixed assets (straight-line depreciation) and the accumulated deferred tax (in order to recognize the interest free nature of the funds provided from this source).

While the rate of return on this base has been calculated for the Public Utilities Commissioners each time the company applied for an increase in rates, the company's applications were, prior to its latest, dated January 24, 1969, based upon the need for additional revenues to cover anticipated forecasted deficits. The rate of return calculation was then used by the Board to determine whether or not consideration of the adequacy of the rate of earnings supported the company's forecast of fiscal need for additional revenue. This "fiscal needs" approach was defined in the judgement by the Board of Railway Commissioners for Canada dated February 21, 1927 on the application of The Bell Telephone Company of Canada for approval of revised rates. The judgement in part reads as follows:

"... the company should be allowed sufficient revenue to cover operating expenses, current maintenance, depreciation, taxes, interest and dividends, and to provide an allowance of 2% surplus on the average capital stock issued."

While rates of return as stated previously have been calculated for the Board, the Board has never ruled on an appropriate rate of return as such but rather on the reasonableness of the rates and charges proposed.

In addition to the Auditor's reports prepared at the time of applications for increases in rates, the Public Utilities Commissioners periodically have reports prepared by their Auditors on the company's operations and financial results. These reports appear to serve as information reports. No "order", to the best of knowledge, has ever resulted from the receipt and/or study of these reports by the Board.

Section 11 of the Public Utilities Act states that "every public utility shall, annually, make to the Board a return ... which shall set forth the amount of its authorized and paid up capital, its assets and liabilities.." and othe financial information. The company complies with this section of the Act by completing and filing annually a standard form provided by the Public Utilities Commission.

BELL CANADA

The Bell Telephone Company of Canada was incorporated by Special Act of Parliament of Canada in 1880. This Act of Incorporation was subsequently amended twelve different times between 1882 and 1968.

By the end of the company's first year of operations, it was serving over 2,000 telephones. This increased to 40,000 telephones by the end of the last century. With the exception of the year 1908, when the company disposed of its properties in the western provinces and with the exception of three years during the early depression years of the 1930's, the company has recorded an increase in the number of telephones in service in every year since its incorporation. By 1945, the number of telephones in service reached 1,000,000. The 2,000,000 mark was reached in 1953 and the 5,000,000 mark was reached in 1967.

As of December 31, 1969, the company had a total of 5,752,820 telephones in service. Of this, 2,260,631 were in the Province of Quebec; 3,482,536 were in the Province of Ontario; 7,899 were in Newfoundland; and 1,754 were in the Northwest Territories.

The Charter powers of the company permit Bell to engage in the widest possible range of telecommunications services, namely, "the transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic systems ..."

Bell's power to operate a telecommunications business is qualified, however, by further provisions contained in its Charter. In particular, Bell

must act solely as a common carrier, and shall not control the contents, nor influence the meaning of purpose, of any message transmitted over its facilities. Bell is also restricted insofar as it cannot hold, either directly or indirectly, a broadcasting licence or a CATV licence.

Bell's Charter also grants it the power to construct and maintain telecommunications lines along or across public highways, the power to purchase telephone lines and to enter into arrangements with any company that is a proprietor of a telephone line or with any company that has the power or right to use communication by means of the telephone, the power to acquire real estate and the power to invest in companies engaged in telecommunications research and development.

Between its incorporation and 1968, Bell's Charter was amended nine times to permit its shareholders to increase the capital of the company from \$500,000 to \$1,750,000,000. The par value of common shares was changed in 1948 from \$100 to \$25. In 1968, the company was given the power to issue preferred shares. Under the provisions of the 1929 amendment to Bell's Charter, the issue and sale of all stock was made subject to the approval of the Board of Railway Commissioners, the predecessor of the Canadian Transport Commission.

The company's Charter makes it mandatory for the company to provide telephone service to all applicants on prepayment of lawful rates provided, however, that the telephone service is to be used for a lawful purpose and provided that it is to be located within a territory to which a general service is given, and provided that it is within two hundred feet of any street along which the company has telephone plant.

In 1882, Bell's Charter was amended to indicate that the company had the power to extend its telephone lines throughout the whole of the Dominion of Canada. Furthermore, the works of the company were declared to be for the general advantage of Canada. In 1906, the company's Charter was amended so that the company and its Charter were made subject to the provisions of the Railway Act. Accordingly, the Board of Railway Commissioners, (subsequently the Board of Transport Commissioners for Canada and now the Canadian Transport Commission), was granted jurisdiction over Bell as hereinafter indicated.

CORPORATE RELATIONSHIPS

With over 251,000 shareholders and approximately 97.7% of them living in Canada, Bell has more shareholders than any other Canadian company and more Canadian shareholders than any other company in the world. As of December 31, 1969, these Canadian shareholders owned 95.4% of all outstanding Bell shares.

The total foreign ownership of Bell shares presently amounts to approximately 4.6% of the outstanding stock. The proportion held by the American Telephone and Telegraph Company stands at approximately 2.1%.

In addition to A.T. & T., there are only four other shareholders who own more than 1% of the outstanding shares of the company. These four shareholders are all large Canadian investment institutions and their ownership amounts to between 1.3% and 2.7% of the total shares outstanding for a total joint ownership of 7.8%.

Bell Canada, itself, is a shareholder in other telephone companies and has a majority interest, ranging from 50.5% to 100% in the major telephone systems serving Newfoundland, New Brunswick, Nova Scotia and parts of Quebec and northern Ontario. Bell's total investment in these and other subsidiaries amounted to more than \$282,000,000 by the end of 1969.

Among Bell's major telephone subsidiaries is Newfoundland Telephone Company Limited which operates the principal communications systems on the Island of Newfoundland. Bell's ownership in this company amounts to 99.6% of the outstanding shares. The New Brunswick Telephone Company, Limited is controlled by Bell through a 50.5% ownership of shares. Ownership of 51.8% of the outstanding shares of Maritime Telegraph and Telephone Company, Limited was acquired by Bell Canada in 1966. This company operates a telephone service throughout the Province of Nova Scotia and through its wholly owned subsidiary, The Island Telephone Company, Limited, throughout the Province of Prince Edward Island. Although Bell is a major shareholder in the Nova Scotia company, Bell does not have voting control in that company's operations. At the time of Bell's purchase of shares in the Maritime Telegraph and Telephone Company, Limited, the Nova Scotia Legislature passed legislation restricting M.T. & T. shareholders to voting a maximum of 1,000 shares.

In the Province of Quebec, Bell Canada's main operating subsidiary is Télébec Ltée. which was formed in 1969 by the amalgamation of La Compagnie de Téléphone d'Arthabaska Ltée., La Tuque Telephone Company, The Pontiac Telephone Company Limited, Télébec Inc., Télécommunications de l'Est Ltée., Télécommunications Richelieu Ltée., Le Téléphone de Contrecoeur Ltée. and Téléphone Princeville Ltée. The assets of a ninth Bell Canada subsidiary,

La Cie de Téléphone de Disraeli have been sold to Télébec Ltée. and the Disraeli Company charter is being surrendered. In 1969, Bell also acquired control of Lièvre Valley Telephone Company which operates in the Lièvre Valley region of Quebec.

In the Province of Ontario, the main Bell Canada subsidiary is Northern Telephone Limited. Ownership of 88% of the outstanding shares of this company was acquired in 1966. Northern Telephone Limited serves the northern part of Ontario and through its subsidiary, Northern Quebec Telephone Inc., the Noranda-Val d'Or region of the Province of Quebec. Northern Telephone Limited also owns more than 50% of the voting stock of Algoma Central Telephone Company Limited, which operates in northern Ontario.

Bell Canada also owns 100% of the outstanding shares of Capital Telephone Company Limited, which operates a telephone service in the upper Ottawa Valley. In addition, Bell Canada owns Maitland Teleservices Limited, which operates in the villages of Brussels and Blyth, Ontario. Bell is presently in the process of surrendering the charter of a further Ontario subsidiary, namely that of Southern Teleservices Limited. The North Telegraph Company, which is a telegraph company incorporated by a Special Act of the Federal Parliament in 1886, is a further Bell Canada wholly owned subsidiary.

In addition to the above mentioned operating subsidiaries, Bell Canada also controls and wholly owns the Northern Electric Company. Although this company acts as the manufacturing arm of Bell Canada for most of Bell's telecommunication equipment needs, it also competes actively for non-Bell business and is, in fact, Canada's largest manufacturer of communications equipment. Northern Electric was incorporated in 1914 when two other Bell

subsidiaries, one of which was engaged in the manufacture of telephone equipment and the other in the manufacture of wire and cable, merged.

An agreement exists between Bell Canada and Northern Electric, which requires Northern to manufacture materials on request from Bell. The agreement does not, however, limit Bell's freedom to purchase materials from other sources.

Northern Electric, in turn, wholly owns Dominion Sound Equipment Limited and has a controlling interest in Microsystems International Limited, the latter being a company incorporated in 1969 to develop and manufacture microcircuitry for sale in Canada and internationally. Northern also controls Northern Electric Caribbean Limited, Northern Electric Telekomunikasyon, A.S. (Turkey), and Industrial Corporation for Telecommunications Equipment S.A., Northern Electric Hellas. These last three companies are foreign based manufacturing organizations.

Bell Canada and Northern Electric Company are presently engaged in establishing a new research and development corporation known as Bell Canada - Northern Electric Research Limited, which will go into operation during 1970. This new research organization will integrate the old research and development divisions of Bell Canada and Northern Electric.

Bell's wholly owned subsidiary, Northern Electric, has agreements with Western Electric, whereby Western supplies Northern with information relating to the development and manufacture of telephone equipment. Bell also has an agreement with the Bell Telephone Laboratories in the United States whereby the Bell Labs are developing electronic data processing systems for use by the telephone industry.

OPERATING TERRITORY

As a federally incorporated company, Bell Canada has authority to carry on business throughout Canada. This is made clear in Bell's Charter which provides that Bell has the power to extend its telephone lines from any one to any other of the several Provinces in the Dominion, and from any point in Canada to any point in the United States. In fact, Bell has operated at one time or another in all Provinces except British Columbia.

At present, Bell carries on business directly in southern and central Ontario and southern and central Quebec and in remote locations in Labrador and the Northwest Territories. As already mentioned, Bell also owns interests in the companies that carry on telephone businesses in northern Ontario and northern Quebec, in New Brunswick, in Nova Scotia and in the southern half of Newfoundland.

REGULATION

Bell Canada falls under the regulatory jurisdiction of the Canadian Transport Commission. The Commission's jurisdiction includes jurisdiction over Bell tolls and tariffs for local and long distance telephone service. Prior to 1967, these regulatory functions were discharged by the Board of Transport Commissioners for Canada, and before that by the Board of Railway Commissioners. The Board of Railway Commissioners obtained jurisdiction over Bell Canada as a result of an amendment to Bell's Charter in 1906, which made Bell Canada subject to the provisions of the Railway Act.

Regulation of Bell's rates first occurred in 1892, when Bell's Charter was amended to prohibit Bell from increasing its then existing rates without the consent of the Governor-in-Council. Then in 1902, Bell's Charter was further amended to permit the Governor-in-Council to increase or decrease company rates upon the application of the company or of any interested municipality. The Governor-in-Council, in turn, had the power to commission any Supreme Court, Exchequer Court or Superior Court Judge to inquire in a summary way into the application and to make appropriate recommendations to the Governor-in-Council for an order changing the rates.

Under the Railway Act, the Canadian Transport Commission has the power to regulate all telephone tolls and rates where the tolls and rates are to be charged to the public. The government recently introduced Bill C-11 in the House of Commons, however, to amend the Railway Act. The explanatory notes to this Bill indicate, in part, that "these amendments would remove the exemption for private wire services and would place telegraph and telephone tolls for all a company's services and facilities within the jurisdiction of the Canadian Transport Commission".

The question of regulated and unregulated services was an issue during Bell's 1968 rates application. As a result, the C.T.C. ordered Bell to investigate methods of separating its cost and revenue accounts between these socalled regulated and unregulated services.

The Railway Act provides that all tolls are to be just and reasonable. Prior to 1966, the Board of Transport Commissioners for Canada tested the reasonableness of Bell's rates on the basis of the company's earnings requirements. In 1966, the Board adopted a new basis, namely the rate of

return on total average capitalization and established a permissive level of earnings for the company ranging from 6.2% to 6.6%. Then in 1969, in rendering its judgment on Bell's application for a rate increase, the Canadian Transport Commission held that it should not adopt a permissive rate of return as the sole test of the reasonableness of telephone rates. Accordingly, no permissive levels were established.

Under a provision inserted in Bell's Charter in 1929 and amended in 1957 and 1967, Bell must seek the approval of the Canadian Transport Commission before issuing or distributing capital stock of the company. The Commission must approve the amount, terms and conditions of any such issue. Under this provision, all Bell stock issues since 1929 have been approved, including the company's Employees' Savings Plan whereby Bell employees are permitted to buy Bell shares on special terms. In 1968 the Commission issued an order permitting Bell to extend its Employees' Savings Plan to the employees of specified Bell subsidiaries, including the Northern Electric Company.

Under the provisions of a further Bell Charter amendment made in 1968, the company can establish requirements for the attachment of customer-owned equipment to Bell lines. The customer can appeal to the Commission if he thinks Bell's requirements are unreasonable and the Commission can determine, as a question of fact, whether the requirements are reasonable or not.

The Railway Act gives the Canadian Transport Commission jurisdictional powers over several other matters affecting the company. For example, the Commission has the power to order the terms and conditions under which another telephone system is to interconnect with the company's system. All

the interconnection agreements, in fact, must be approved by the Commission. The Commission also has the power to determine whether any tolls or tariffs of the company are unjust or discriminatory. The Commission also has the jurisdiction to establish the height of aerial cables in cities, towns and incorporated villages. Any agreement limiting the liability of the company in respect of any traffic must be approved by Commission.

MANITOBA TELEPHONE SYSTEM

The first major telephone company in the Province of Manitoba was The Bell Telephone Company of Canada, which commenced operations in Winnipeg in 1881, taking over some small, local, privately owned companies. The Bell Company continued its operations in Manitoba until January 15, 1908, when the Government of the Province of Manitoba purchased the properties and system of The Bell Telephone Company of Canada with the purpose of supplying telephone communications throughout the whole of the Province.

Originally, the Provincially-owned telephone system was named "Manitoba Government Telephones" by an order-in-council dated January 15, 1908, but at that time it was not a corporation but was a Department of the Provincial Government, presided over by a minister of the Crown. Within the departmental structure, the Manitoba Government Telephones was operated by a Commission of three members who, subject to the Government direction, were empowered to operate the system and to build and construct additions to the system.

Telephone service extended tremendously in the first four years of the Government system's operation, and, as the operation was losing money, the Commissioners proposed to introduce the "measured service" principle of rate-making so that the telephone user would pay approximately according to the use he made of the service. This proposal aroused a great deal of protest, eventually resulting in the appointment of a Royal Commission to report on the condition and administration of the Government telephone system.

As a result of the Royal Commission report, the Manitoba Government Telephones was re-organized in 1912, and the management of the system was delegated to one Commissioner in July of that year and, at the same time, by the Public Utilities Act of 1912, a Public Utilities Commissioner was appointed, with certain jurisdiction over rates, service, depreciation reserves and a general supervision over the utility. This was the beginning of what is, now, the Public Utilities Board of the Province of Manitoba, operating under the Public Utilities Board Act.

The Manitoba Government Telephones still, however, remained a department of the Government, and the Commissioner's operation of the system was subject to the review of an advisory board of the Provincial Government which included the Premier, members of the Cabinet, the Public Utilities Commissioner, and the Telephone Commissioner himself. This Board functioned from August 1912 to April 1920, when it was dissolved.

In 1921, Mr. John E. Lowry, then the sole Commissioner of the Manitoba Government Telephones, changed the name of the system from "Manitoba Government Telephones" to "Manitoba Telephone System". The newly named Manitoba Telephone System still remained a Department of the Government until the passage of the Manitoba Telephone Act of 1933, which repealed the Telephone and Telegraph Department Act, and the Manitoba Telephone and Telegraph Act, and set up the "Manitoba Telephone Commission" as a body corporate, consisting of one, two, or three Commissioners, as determined from time to time by the Lieutenant-Governor-in-Council. The passage of the Manitoba Telephone Act was the beginning of the Manitoba Telephone System as

a corporate body and the new Act abolished the Department of Telephones and Telegraphs. It is interesting to note, however, that while the Manitoba Telephone System continued to be known by that name, this title was not contained in the Manitoba Telephone Act, in which the system was described as the "Manitoba Telephone Commission", and that this situation remained until 1940, when the Manitoba Telephone Act was amended to provide that, while the official designation of the system was "The Manitoba Telephone Commission", it could alternatively be properly described as "The Manitoba Telephone System". The double title remained in effect until the revision of the Manitoba Telephone Act in 1962, when the Act officially changed the name of the company to "The Manitoba Telephone System", and the second title of "The Manitoba Telephone Commission" was deleted from the Act.

While the Manitoba Telephone Act of 1933 provided for the appointment of up to three Commissioners, the System continued to be operated by one Commissioner, with the assistance of an Executive Committee, consisting of the Commissioner, the Assistant General Manager, and the Comptroller. This Committee advised the Commissioner with respect to operational and financial matters, but final decision on these and policy matters still remained with the Commissioner.

As the Manitoba Telephone System understands its Government policy with respect to Government-owned utilities, it is that the service supplied by each utility is to be supplied to all the people of the Province who, as a practical matter, can be reached at as low a rate as possible, consistent with efficiency. In other words, all parts of the

Province that are accessible are to be supplied with service, regardless of the fact that the supply of telephone service to rural and distant areas will, in most cases, be so supplied at a loss. Other areas and other services of the System will pay such rates as will enable the System to supply rural and distant telephone service, and still not operate the whole of the System at a loss. It is within this policy framework that the System operates.

In 1962, the Manitoba Telephone Act was revised to provide that the operation of the System would be under the control and management of not less than three, and not more than five, Commissioners, and, in 1966, the Act was again revised to provide that the System would be managed and operated by not less than three and not more than seven Commissioners. Actually, the System has, up to this time, had a maximum of five Commissioners at one time, and, at present, is operating with four Commissioners.

Subject to Governmental policy and the Public Utilities Board's regulation, the Commissioners of the Manitoba Telephone System are given complete control over the management and operation of the System.

As of March 31, 1969, the Manitoba Telephone System had in service 402,967 telephones.

CORPORATE RELATIONSHIPS

Being a Provincially-owned Crown corporation, the Manitoba Telephone System has no shareholders in the usual sense, the Provincial Government owning the Manitoba Telephone System on behalf of the people of the Province of Manitoba. The Provincial Government investment in the

Manitoba Telephone System as at March 31, 1969, is approximately \$78,000,000.00. It is probably needless to say, therefore, that the Manitoba Telephone System has no subsidiaries of any kind, either operating, manufacturing, printing or any other, nor does it have any affiliated companies through which it carries on any of its operations.

OPERATING TERRITORY

The Manitoba Telephone System's operating territory is the whole of the Province of Manitoba, and this is not only the territory in which it is authorized to operate, but the System's actual operations cover, substantially, the whole of the Province. While the Manitoba Telephone System has not been given the exclusive jurisdiction to provide telephone service within the Province (and, in fact, municipalities still have the authority under the Municipal Act to operate their own telephone systems if they so desire), experience has proven that, with present day advances in technology and continuous changes in equipment, it is not financially practical for individual municipalities to own and operate their own telephone systems, and with the takeover of the sole remaining municipal telephone system at the end of January 1970, the Manitoba Telephone System is the only company supplying public telephone service to the Province.

REGULATION

The history of the regulatory authority of the Province of Manitoba begins with the establishment of the Public Utilities Commission, with one Commissioner, in August 1912, the first Commissioner being the Honourable Mr. Justice H.A. Robson. The Public Utilities Commission,

represented by the one Commissioner, was followed by a number of utility regulatory bodies, with the number of Commissioners ranging from one to five, and the name changing from the Public Utilities Commission to the Municipal and Public Utilities Board and to its present title, the Public Utilities Board. The present regulatory authority for the Manitoba Telephone System in the Province of Manitoba is the Public Utilities Board, operating under the Public Utilities Act of the Province of Manitoba. The Board consists of a Chairman and five members, the Chairman being a permanent member while the five members have different terms of office, ranging from one to three years. The Board is appointed by the Provincial Government, by order-in-council.

Prior to the complete revision of the Manitoba Telephone Act in 1955, the Manitoba Telephone System was subject to a certain amount of economic regulation by the Public Utilities Board, such as fixing of rates of depreciation, the expenditures of monies in depreciation accounts, and the issuing of securities. The Manitoba Telephone Act revision in 1955 provided that these sections no longer applied to the Manitoba Telephone System, and the Public Utilities Board has no direct jurisdiction to regulate the economy of the System, with respect to the issue of capital, construction expenditures, or in any other areas excepting whatever effect their regulation of rates and their jurisdiction over the matters described in the sections quoted below may have on the System's economy.

The Public Utilities Board jurisdiction to regulate rates is covered by Section 77 of the Public Utilities Board Act, which provides, in part:

"77. The board may, by order in writing after notice to, and hearing of, the parties interested,

- (a) fix just and reasonable individual rates, joint rates, tolls, charges, or schedules thereof, as well as commutation, mileage, and other special rates that shall be imposed, observed, and followed thereafter, by any owner of a public utility wherever the board determines that any existing individual rate, joint rate, toll, charge or schedule thereof or commutation, mileage, or other special rate is unjust, unreasonable, insufficient, or unjustly discriminatory or preferential;"

The Public Utilities Board, in addition to its control over telephone rates, has, to some extent, the rights to technical regulation, mainly as to methods, standards and safety. In addition, the Public Utilities Board had jurisdiction to deal with the joint use of poles by two or more public utilities and authorize discontinuance of service to the public with board authority on proper notice. Some of the general jurisdiction conferred on the Public Utilities Board by its Act, which ordinarily would apply to the Manitoba Telephone System, may be limited by the specific authority given to the Commission of the Manitoba Telephone System under the Manitoba Telephone Act. For example, the powers given to the Commissioners of the System to "fix standards of service to be furnished" may limit the general authority of the Public Utilities Board.

Be that as it may, the Public Utilities Board of Manitoba has, up to date, taken the view that the Commissioners of the System have been entrusted with the general management and operation of the System and the supply of service to its subscribers, and has confined its regulatory

activities to rate matters, dealing with rates in general as they affect the general public, dealing with specific rates for specific services, variation, i.e. increase or decrease in rates, to the public generally, and to a specific area of the public, and ensuring that rates imposed by the System are not unjust, unreasonable, unjustly discriminatory, or unduly preferential.

Section 32 of the Manitoba Telephone Act provides:

"32. (1) Rates for telephone service supplied by the commission shall be approved by The Public Utilities Board Act.

(2) On any application for an increase or decrease in rates or for any variation of such rates, The Public Utilities Board on such application shall, in fixing a rate or rates, take into consideration, among other relevant factors,

(a) the amount required to provide sufficient moneys to cover operating, maintenance, and administration expense;

(b) interest and expenses on debt incurred for the purposes of the commission by the government;

(c) interest on debt incurred by the commission;

(d) reserves for replacement, renewal, and obsolescence, of works of the commission;

(e) such other reserves as are necessary for the maintenance, operation, and replacement, or works of the commission;

(f) and such other payments as are required to be made out of revenue."

There were a great number of small, individual and municipal systems in Manitoba between the year 1908 and 1969, the municipal system territory usually being the territory within the boundaries of the

municipality and the small individual companies being companies formed by a small group (usually of farmers) who supplied what might be described as a "neighbourhood service", and having comparatively few members in the company. Most of these companies were not incorporated or organized in any particular legal form, but were simply groups of individuals who wished to be able to communicate within their local territory and, in the absence of a major telephone system in their area, attempted to provide community communication.

SASKATCHEWAN TELECOMMUNICATIONS

Saskatchewan Telecommunications, a Crown Corporation of the Province of Saskatchewan, had its origin as the Department of Railways, Telegraphs and Telephones established by legislation of the Province of Saskatchewan, on June 12, 1908, which authorized the minister to construct, operate and acquire telephone and telegraph systems. The system remained as a function of the Department from 1908 until 1947 when it was established as a Crown Corporation under the name of "Saskatchewan Government Telephones". On April 1, 1969, the name was changed to "Saskatchewan Telecommunications", "Sask Tel" being the abbreviated name sanctioned by legislation.

From 15,000 local subscribers and 9,000 subscribers of smaller connection companies in 1911, Sask Tel grew to 297,000 local telephones and 52,000 subscribers of connecting rural companies by the end of 1968. From 1909 - 1912 the Department acquired seven major systems from independent telephone companies, one of which was The Bell Telephone Company of Canada. Since that time Sask Tel has built the Province-wide telephone system in Saskatchewan, exclusive of farmer-sponsored rural telephone systems. Present operations cover the wide scope of modern telecommunications services.

OPERATING TERRITORY

Sask Tel is authorized to operate in the whole of the Province. There are no legislative provisions or government directives which restrict or define the territorial operations of Sask Tel. The statutory powers of the corporation, including the right to place its facilities on roads, streets and lanes without restriction, implies a co-ordinated Province-wide system serving both urban and rural areas.

The Rural Telephone Act also permits of farmer-sponsored non-profit companies to serve the farm communities. The Saskatchewan Telecommunications Act however, empowers Sask Tel to expropriate property that in the opinion of the Lieutenant-Governor-in-Council is necessary for the purposes of the corporation. Furthermore, the Minister of Telephones is empowered to delegate the administration of The Telephone Department Act governing rural telephone companies to Sask Tel.

In fact, Sask Tel operates in the occupied area of the Province, basically the southern half, and a few of the larger isolated settlements in the northern part of the Province. Excluded from this are those farm communities served by approximately 900 rural telephone companies and the City of Lloydminster and community of Creighton which are served by Alberta Government Telephones and Manitoba Telephone System respectively by arrangement with Sask Tel because of their proximity to large centers in the neighbouring Provinces. Sask Tel has also assimilated a few of the rural companies in its program of providing telephone service to farmers in unserved areas.

REGULATION

There is no external regulatory authority established to control Sask Tel. Rather, Sask Tel is self-regulated through its cabinet-appointed directors, the Minister of Telephones and a select standing committee of the Legislature to which it must answer for the operations and financial affairs of Sask Tel. The internal regulation of Sask Tel exercised through the channels of legislative, cabinet and ministerial control are as follows:

Tariff adjustments of significant consequence are, as a matter of policy, referred to the directors and responsible minister, and often to the cabinet, for approval.

The Saskatchewan Telecommunications Act restricts the total borrowing by Sask Tel (presently \$175,000,000). Any increase in this requires the approval of the Legislature. Furthermore, all borrowings by or for Sask Tel require the approval of the Lieutenant-Governor-in-Council. The Lieutenant-Governor-in-Council may also regulate the manner of providing for reserves, sinking funds and repayment of moneys borrowed and the conduct of financial operations, etc.

Construction expenditures are necessarily limited by borrowings. Furthermore, Sask Tel is required to submit its proposed capital program to a committee of cabinet each year for approval. In the area of specific control each capital project exceeding \$25,000 in cost is required to be submitted to the directors for approval.

The internal regulation described above reflects the rationalization of competing needs and the development of a co-ordinated policy to provide a reliable grade of service to acceptable standards to all people in the service area, and in co-operation with other Canadian telecommunication companies to meet the needs for national telecommunications service. Sask Tel also strives to earn a satisfactory rate of return while keeping abreast of innovations in new and improved telecommunication services and achieving optimum levels of efficiency in the use of capital and labour.

The role of the legislature in its general control over the capital expenditures of Sask Tel is to evaluate the communication needs against the other capital programs of the Province. The government, or cabinet, has a more specific control in the same area, and can also provide general direction to Sask Tel as to the priorities of emphasis in communication programs, e.g. modernization vs. service to areas requiring subsidization, after Sask Tel has provided evidence as to the service and cost advantages or disadvantages involved. Within this framework Sask Tel endeavours to meet its objectives at rates which compare favourably with other telecommunications companies in Canada.

There is no external regulatory authority over technical aspects of Sask Tel's operations. Sask Tel, in co-operation with other interconnecting telecommunications companies in Canada, adopts designs and standards for equipment and service to meet the compatibility, reliability and efficiency requirements of a national interconnected system of communication facilities.

Sask Tel's technical regulation is basically self-imposed in accordance with good practices and industry standards, and by co-operation and agreement with other parties affected by the installation or operation. Sask Tel constantly endeavours to keep these standards at high levels having regard to the capacity of technology to provide higher levels within the limits of economic feasibility.

ALBERTA GOVERNMENT TELEPHONES

In 1906 shortly after Alberta became a Province, Alberta Government Telephones (A.G.T.) was formed as a part of the Department of Public Works of the Provincial Government. The department commenced building a toll line between Calgary and Banff in that year and completed it in 1907. At that time the population of the Province was small, and privately owned companies were operating in Alberta but expanding slowly. The Bell Telephone Company of Canada, having entered Alberta through solicitations of Mayor King of Calgary in 1887, was operating small exchanges at Calgary, Lethbridge and Medicine Hat and toll lines from Edmonton to Calgary, Lacombe to Bentley, Lethbridge to Cardston, Lethbridge to Spring Coulee. The City of Edmonton purchased all lines and plant of The Edmonton District Telephone Company in January, 1905, before Alberta became a Province, which company was operating an exchange in Edmonton and Leduc and a toll line between Edmonton and Leduc and a rural telephone line on two circuits between Edmonton and Fort Saskatchewan, one of which was used as a toll line while five subscribers were originally connected to the other line. The Alberta Telephone Company had a line strung on trees between communities in Crow's Nest Pass.

In 1906 the Federal Government turned over to the Provincial Government all rights and titles to the original telegraph circuits then being operated as telephone lines by the City of Edmonton. By the end of 1907 the Provincial Government had built a number of toll lines, installed twelve new exchanges and purchased some telephone lines throughout the Province. On April 1, 1908, the Alberta Government, after considerable

negotiations, purchased the Bell Telephone assets in the Province for \$675,000.00. At that date the telephone plant built and acquired by purchase consisted of 1,200 miles of toll line, 60 toll offices, 35 exchanges and just under 3,000 subscriber stations.

A.G.T. telephones in service in Alberta grew to over 33,000 in 1918. The telephone industry experienced steady growth in Alberta and at December 31, 1968, there were 431,000 A.G.T. telephones in service. Rural Mutual Companies owned 28,000 telephones and the City of Edmonton owned 190,000. In all, there were about 650,000 telephones in Alberta in 1968 of which 99.4% were dial.

The telephone growth in Alberta was, as in other parts of Canada, particularly rapid in the 1950's and in 1958 A.G.T. became an independent Crown Corporation pursuant to the Alberta Government Telephones Act of 1958 which repealed and replaced The Telephone and Telegraph Act. Up until 1958 all of A.G.T.'s debt capital consisted of advances from the Provincial Treasurer. After the system became a Crown Corporation it proceeded to sell long term debt securities to the public in both Canada and the United States. In 1960 its gross plant was under \$150,000,000 and by 1968 this had increased to over \$400,000,000 with a construction budget of \$64.2 million for the year 1969. The debt securities are all unconditionally guaranteed by the Province of Alberta, and this helps A.G.T. obtain a comparatively low rate of interest on debt capital.

OPERATING TERRITORY

A.G.T. serves the Province of Alberta with the exception of exchange service to both a large part of the City of Edmonton and to some rural areas.

The City of Edmonton provides exchange service within an agreed boundary area, which corresponds, with adjustments for technical reasons, to the approximate corporate limits of the City as of 1962, the effective date of the service boundary agreement. A.G.T. serves outlying parts of Edmonton and the relatively densely populated part which was formerly the Town of Jasper Place, which areas have become annexed to Edmonton since 1962.

The rural mutual telephone companies were created during the depression of the 1930's. Regulations for the creation of independent private companies or co-operative associations were passed, published and distributed in 1933. There were 1,080 such companies formed under this legislation. The rural lines had become prohibitively expensive to maintain and they generated little revenue. Under the supervision of A.G.T., rural mutual telephone companies were organized to take over and maintain existing rural outside plant which was virtually given to them pursuant to prices set out in the regulations, e.g. telephone poles in the ground were sold for 30 cents each. The farmers managed to finance the operation of their systems by doing most of the work themselves on the rural pole lines. Ownership and operations of the exchanges to which the rural lines were connected remained in the hands of A.G.T. In 1966 there were over 39,000

rural mutual telephones in Alberta but this had decreased to 28,000 in 1968 and is decreasing further as a result of four party buried cable being supplied by A.G.T. to replace multi-party open wire, to meet the demands and needs of the rural communities. As a result the rural mutual telephone companies are gradually winding up, and as of October 1969 there were about 650 companies still operating with under 27,000 telephones.

REGULATION

A.G.T. has, since 1915, been subject to the regulatory authority of the Alberta Public Utilities Board. The Alberta Public Utilities Board, formerly called the Board of Public Commissioners, has been continuously in existence since 1915.

This is a Provincial regulatory board with various duties, which appear today to be primarily utility regulation and the setting of compensation in expropriation cases. The Board is composed of three members all of whom are appointed by the Lieutenant-Governor-in-Council for 10 years during good behaviour and eligible for reappointment until reaching the age of 65. Board members are removable by the Lieutenant-Governor-in-Council on address of the Assembly. On matters within its jurisdiction the Board has, "all such powers, rights, privileges and immunities as are vested in the Supreme Court of Alberta." The practices and procedures followed by the Public Utilities Board parallel court procedures. Currently and throughout most of its recent history, the Board has been composed of two members with legal training and experience and one member a chartered accountant. The Board has a permanent secretary and two chartered accountants and clerical help on permanent staff. The Board has employed professional engineers and other

experts to assist it from time to time, but it relies primarily on the adversary system where the parties call expert evidence, subject to cross-examination to prove their proposals. There have been several Board orders approving changes necessarily introduced over the years but there have only been 3 contested public hearings to implement general rate adjustments namely 1921, 1926 and 1966.

The first application to the Public Utilities Board for a rate increase in toll rates was made in April, 1921.

In the early years there was no sound accounting basis on which A.G.T. set rates. In 1907, the Minister of Public Works had arbitrarily set toll rates on the Calgary Banff toll line at 30% below the rates of the competing Bell system for comparable distance. This rate was the basis for rates on other toll lines. Accounting systems of Alberta, similar to those of Manitoba and Saskatchewan, appear to have been set up to help show, or purport to show, that the operations were profitable. In Alberta there was a small contribution to the sinking fund of about $\frac{1}{2}$ of 1% of gross revenue, but no allowance for depreciation.

In 1918 a consultant from the United States, J.G. Wray, was engaged to value the plant and make recommendations on all procedures. As a result of the Wray Report, A.G.T. adopted the standard accounting procedure for public utilities approved by the U.S. Interstate Commerce Commission. Today, A.G.T. and all major telephone companies in North America use a uniform system of accounts based on F.C.C. regulations. The toll operation in 1920 with uniform accounting showed a loss of \$160,000.00, and the Public Utilities Board allowed a 15% increase.

The next application in 1926 was made to increase the monthly exchange rates. At this hearing the question of the allocation of costs to separate exchange was raised by the Cities of Calgary, Lethbridge and Medicine Hat, who advanced the argument that the cities were indeed paying more than their share, but the Board ruled that such determinations were "wholly impractical" and further stated that, "State-wide method of treatment indeed is now so universally adopted by courts and commissions that argument for it as an original proposition is quite unnecessary."

Alberta Government Telephones is dedicated to provide a high standard of service at reasonable rates, and to meet the rapidly expanding communications requirements throughout the province. The philosophy adopted in striving to achieve these goals (which now include, in addition to telephone service, telemetering and supervisory control facilities, closed circuit television service, equipment to transmit printed matter and pictures over telephone circuits, teletypewriter service, high speed data transmission service to computer centers and the most extensive general mobile radio telephone service in Canada), has changed.

In the 1926 Public Utilities Board Decision it was stated that this Department of the Government was operating the utility "not for profit but in order to render service at cost".

In the 1966 Public Utilities Board hearing the costs of service were considered in much greater detail. For example, a comprehensive independent depreciation study showed the annual depreciation of the current sophisticated equipment to be the largest item of operating costs. Further, A.G.T. asked the Board for a rate of return which would not only provide for

the cost of obtaining and servicing debt capital but also would include a reasonable allowance for, "a net income (profit) which is necessary for the most efficient management of the utility system." Further, it is clear from Alberta Order in Council 680/65 dated April 15, 1965, that the Executive Council of the Government of Alberta expressed the desire that A.G.T. operate similar to a private company by paying its debts and by paying a reasonable return to the Province on the equity capital invested in the Commission by the Province.

A.G.T. has paid the Province only nominal dividends and has reinvested surplus earnings as well as depreciation recoveries in new construction to provide modern communication services, even to remote areas, as soon as possible.

The Alberta Public Utilities Board has, for many years, followed the rate fixing method using a rate base determined on the original cost, less depreciation of the assets used and useful in the public service, plus an allowance for working capital and a rate of return which is that percentage which, when multiplied by the rate base, gives the number of dollars required to operate the utility, to pay all expenses including the cost of debt capital and the depreciation expense and to leave a return for equity shareholders similar to that being paid by other businesses of comparable risk. After the earnings requirements are determined, the utility at a later public hearing submits rates to generate such earnings and after these are checked and subjected to cross examination they are allowed, provided they meet the tests of reasonableness, i.e. they generate the projected requirements and they are not discriminatory.

In Alberta the rates charged by municipally owned utilities are not subject to the Public Utilities Board but are fixed by the elected representatives of the municipality. Edmonton operates the only municipally owned telephone system in Alberta. Edmonton Telephones has been operated since before the formation of the Province and the first legislature recognized its existence by passing the Municipal Telephone Act.

Edmonton Telephones provides exchange telephone service to most of the residents of the City of Edmonton.

A.G.T. and Edmonton Telephones have worked out a mutually agreeable boundary line and the supply of interconnection facilities to provide Edmonton subscribers access to A.G.T. toll lines.

Edmonton Telephones has a service agreement with A.G.T. through which advice and assistance is available from A.G.T. on both technical and operating matters for an annual fee.

There are some areas of conflict between the two systems, the most serious of which concerns whether or not the profit from toll calls to and from Edmonton is sufficient to cover the required cross subsidization of the unprofitable rural areas.

There have been attempts to amalgamate the Edmonton and A.G.T. systems which reached an advanced state in 1928 but failed apparently as a result of the depression and have not since been reactivated to any meaningful negotiation stage.

BRITISH COLUMBIA TELEPHONE COMPANY

The British Columbia Telephone Company owns and operates the principal telephone system in British Columbia and is the second largest telephone company in Canada. At the end of 1969, there were 974,823 telephones in service.

Telephones were first installed in British Columbia in the spring of 1878 at two different locations on Vancouver Island and the first telephone company was incorporated on May 8, 1880 as the Victoria and Esquimalt Telephone Company Limited. The first mainland system was founded February 18, 1884, as the New Westminster and Port Moody Telephone Company, Limited with the name being changed on April 6, 1886 to The New Westminster and Burrard Inlet Telephone Company.

The Vernon and Nelson Telephone Company, Limited was incorporated on April 20, 1891 and was authorized to extend operations to all parts of the Province on May 11, 1903.

The New Westminster and Burrard Inlet Telephone Company, Limited acquired Victoria and Esquimalt Telephone Company, Limited in 1899 and on March 14, 1904, the assets of both were purchased by the Vernon and Nelson Telephone Company, which on July 5, 1904 had its name changed to British Columbia Telephone Company, Limited.

On April 12, 1916, the Western Canada Telephone Company was incorporated as a federal company with powers to operate anywhere in British Columbia and to extend lines outside B.C. and on November 29, 1919, authorization was granted to change its name to British Columbia Telephone Company (without the Limited). The new company first leased and operated

the property of the provincial British Columbia Telephone Company, Limited and on February 8, 1923, acquired its assets thus marking the start of British Columbia Telephone Company as it is today.

The North-west Telephone Company obtained a provincial charter in 1929. British Columbia Telephone Company acquired the Mission Telephone Company Limited in 1952 and the Kootenay Telephone Company Limited in 1953. With the North-west Telephone Company it took over part of the Government Telegraph and Telephone Service territory in B.C. in 1954 and acquired Chilliwack Telephones Limited in 1954. In 1961, the North-west Telephone Company was amalgamated with British Columbia Telephone Company. In 1966, the British Columbia Telephone Company acquired controlling interest in the Okanagan Telephone Company and at December 31, 1969, held 99.84% of its outstanding common shares. Okanagan was incorporated under the laws of B.C. by Private Act passed in 1907.

OPERATING TERRITORY

British Columbia Telephone Company's charter gives it authority to operate telephone lines over or under water or over or under land between any place in the Province of British Columbia. It also gives authority to the company to operate extensions of lines to places outside the Province of British Columbia and to operate steamships and other vessels anywhere in the world for the purpose of laying submarine cable and may operate wireless telephone and radiotelephone systems for the transmission of sound, pictures, writing or signals, except telegraph messages. The charter stipulates that the company shall not construct, operate or maintain telephone lines other than long distance lines in the City of Prince Rupert without first having obtained the consent of that city, and the same rule applies to the

Province of Alberta, Saskatchewan and Manitoba in which latter case the consent of the Lieutenant-Governor-in-Council of the particular Province must be first obtained.

CORPORATE RELATIONSHIPS

The principal shareholder of British Columbia Telephone Company is Anglo-Canadian Telephone Company which is a subsidiary of General Telephone & Electronics Corporation. Anglo-Canadian owned as of December 31, 1969, 1,447,431 or 50.31% of the 2,877,000 outstanding ordinary shares of the company. Anglo- Canadian is incorporated under the laws of the Province of Quebec and its Head Office is in Montreal.

General Telephone & Electronics Corporation is incorporated under the laws of the State of New York and its Head Office is in New York City. It is a worldwide communications and manufacturing enterprise with widely diversified operations, known as the General System. The telephone operating companies of the General System served more than 10,179,000 telephones as at December 31, 1969 and provide many types of communications services, ranging from telephone service for the home and office to highly complex voice and data transmission services for industry and national defence. The more than thirty telephone operating subsidiaries of G.T. & E. in the United States comprise the largest independent (non-Bell) telephone system in North America. Through subsidiaries of Anglo-Canadian, it also provides communications service in British Columbia, Quebec and the Dominican Republic. Through manufacturing subsidiaries, G.T. & E. is a leading producer of communications, electronics and lighting equipment with plants located in the United States, Canada, Latin America, the Caribbean, Western Europe and the Far East. The General System also owns 431,250

common shares of the Communication Satellite Corporation. With consolidated assets of over \$5,430,576,000.00 and more than 150,000 employees, the General System constitutes one of the larger industrial groups in the world.

The manufacturing and marketing activities of the General System outside the United States are conducted through a wholly owned subsidiary, General Telephone & Electronics International Incorporated, which owns all of the outstanding shares of Sylvania Electric (Canada) Limited and Automatic Electric (Canada) Limited, which latter company owns all of the outstanding shares of Lenkurt Electric Company of Canada, Limited. Sylvania Electric (Canada) Ltd. supplies electronic tubes, transistors and other electrical components to a wide cross-section of Canadian users including British Columbia Telephone Company. Automatic Electric (Canada) Limited manufactures a wide range of communications systems, equipment and devices and is a major supplier of telephone switching equipment, switchboards, telephone instruments, telephone answering and warning devices, inter-communications systems and pay stations to the company and to the Canadian communications industry in general. Lenkurt Electric Company of Canada Ltd. is a major producer in Canada on communication transmission equipment and supplies British Columbia Telephone Company and others with microwave radio equipment, multiplex equipment and data transmission equipment.

In addition, Dominion Directory Company Limited, a wholly owned subsidiary of Anglo-Canadian, sells directory advertising for, and supervises the publications of, telephone directories for British Columbia Telephone Company and its subsidiaries as well as those of other companies. Canadian Telephones and Supplies Ltd., all the outstanding shares of which are owned

by Anglo-Canadian, provides certain contract services for British Columbia Telephone Company and others in relation to installations and repairs.

The company has a service contract with G.T. & E. Service Corporation under which that corporation provides the company with services similar to those provided to Bell Canada by A.T. & T.

Through its own facilities and through interconnecting arrangements linking its systems with all the world's major telephone systems, the British Columbia Telephone Company and its subsidiary, Okanagan Telephone Company, provide complete communications services to more than 99% of the Province's 1.9 million population. These communications services include local exchange telephone service, in which more than 99% of its telephones are dial operated, long distance telephone services through facilities which permit customers to dial long distance calls directly from more than 76% of its telephones, and teletype, data facsimile, closed-circuit television and other specialized transmission services. The company employs approximately 8,660 people (including Okanagan Telephone Company personnel) to serve its customers and to operate, maintain and expand its installations.

The company also operates one of the world's largest public service radiotelephone systems, providing links between the regular telephone system and more than 9,000 radiotelephone sets in automobiles, aircraft, industrial vehicles, fixed land stations serving remote settlements and more than 5,000 marine vessels plying British Columbia's coastal water. The company

also provides the operating center for the Canadian end of the Commonwealth Pacific Cable between Vancouver and Australia.

British Columbia Telephone Company, with the approval of the Lieutenant-Governor-in-Council of Alberta, has extended its telephone lines into a part of the Bay Tree area of Alberta, and has a small number of telephones operating in that Province. The company has also provided service to Point Roberts peninsula which is a small piece of United States' territory isolated from the States of Washington, and in this area there are approximately three hundred telephones. This area is served with the knowledge and unofficial approval of the utilities authorities in the State of Washington and although British Columbia Telephone Company is not licensed to carry on business there, nevertheless it has done so with success for many years.

Okanagan Telephone Company owns and operates the local and long distance telephone system in the Okanagan Valley and surrounding districts of the Province of British Columbia. The territory served by Okanagan Telephone Company contains approximately 5% of the Province of British Columbia and has over 50,000 dial telephones in service.

REGULATION

The company is subject to regulation by the Canadian Transport Commission in respect to most of its rates and issues of capital stock. The company's present regulated rates, with minor exceptions, were established by the Judgment and Order of the Board of Transport Commissioners for Canada (hereinafter called the "Board") dated December 4, 1958. The said rates became effective January 1, 1959.

During October and November of 1965, the Board conducted a public review of the operations of the company. The review was initiated by the Board to consider the capital investment, revenues and expenses, debt charges, dividend payments and retained earnings of the company and the permissive level of the company's earnings and the basis upon which such permissive level may be authorized for telephone rate purposes. During the course of the review, the Board did not examine the company's existing tariffs.

In its Judgment handed down on May 4, 1966, the Board said that the computation of a permissive level of annual earnings with which to test the justness and reasonableness of the rate structure as a whole, should take the form of a percentage of the company's total average annual capitalization. The Board also stated that in the light of the experience of the past eight years and in the light of the then current and immediately foreseeable conditions, the over-all rate of return on the company's total average annual capital outstanding should lie within a range of from 6.2% to 6.6%. The Board found that the company's rate structure as a whole was just and reasonable since in the period under review, it did not produce annual earnings resulting in an annual return for the company on its total average annual capitalization greater than 6.6%. The Board stated that its findings in the circumstances and conditions of a particular time, including the probable future trend of those circumstances and conditions, are not necessarily applicable to future times when circumstances and conditions may be altogether different.

Okanagan Telephone Company is subject to the supervision of the Public Utilities Commission of British Columbia which regulates the

undertakings of Okanagan Telephone Company including rates, extensions and standards of service and the issue of securities.

The Canadian National Railway supplies telephone service to the far northern areas of the Province of British Columbia and the only other organization not already mentioned providing telephone service in British Columbia is the Municipality of Prince Rupert which supplies service to its own community.

APPENDIX B

TELEPHONES IN CANADA BY PROVINCE, 1968

	<u>Residence</u>	<u>Business & Order</u>	<u>Total</u>
NEWFOUNDLAND	83,461	34,653	118,114
NOVA SCOTIA	189,613	70,110	259,723
PRINCE EDWARD ISLAND	23,062	7,663	30,725
NEW BRUNSWICK	150,288	56,990	207,278
QUEBEC	1,685,422	717,735	2,403,157
ONTARIO	2,460,840	1,006,528	3,467,368
MANITOBA	288,955	111,161	400,116
SASKATCHEWAN	261,005	89,008	350,013
ALBERTA	450,510	197,260	647,770
BRITISH COLUMBIA	661,491	260,682	922,173
YUKON	2,670	2,485	5,155
NORTHWEST TERRITORIES	<u>3,470</u>	<u>2,784</u>	<u>6,254</u>
TOTAL	6,260,787	2,557,059	8,817,846

Source: D.B.S. Telephone Statistics, 1968.

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TELEPHONE SYSTEMS IN ONTARIO UNDER PROVINCIAL JURISDICTION

This area is divided into two parts:

- (a) Telephone services provided by the Independent Telephone systems and
- (b) Telephone services provided by the Ontario Northland Transportation Commission

GENERAL

Most residents are unaware of the existence of independent telephone systems in the Province. Although the Bell Telephone Company provides services in Southern Ontario, and Ontario Northland Transportation Commission and Bell (or its subsidiaries) both provide services to Northern Ontario, there are also independent telephone systems which operate extensively throughout the Province. These independent telephone systems, of which there were 66 as of January 1, 1970, supply services, generally, in farm communities. Although the total number of telephones provided is small (183,858), the area covered by these services extends over a large part of Ontario.

A. Independent Telephone Systems in Ontario

1. The independent telephone systems operate under the provisions of "The Telephone Act", R.S.O. 1960, Chapter 394, as amended by 1962-63, Chapter 139, and 1966, Chapter 153, and 1970 (Bill 84). This Act is administered by the Ontario Telephone

Service Commission under the Department of Agriculture and Food.

Most of the independent companies in Southern Ontario participate in the handling of long distance service by providing toll lines and equipment in their own areas, which in turn connect with the Bell Telephone Company network and the Trans Canada Telephone System. In Northern Ontario, long distance service is supplied jointly by the Bell Telephone Company, Northern Telephone Limited and the Ontario Northland Transportation Commission.

2. HISTORY

A few independent telephone systems were in business in the Province of Ontario before the turn of the century, but the greatest expansion in the early years took place in the ten year period 1906-1915. The number continued to increase until 1921 when a peak of 680 companies operated throughout the Province. Their growth resulted from demand in small communities and rural areas for telephone service and for connection with larger centres.

These systems were regulated by the Ontario Railway and Municipal Board under the authority of the Ontario Telephone Act 10 Edw. VII, C.84, (first enacted by the Legislature in 1910). This Board was the predecessor of the present Ontario Municipal Board. The origins of the Telephone Act may be found in the following statutes:

- 1) An Act respecting Local Municipal Telephone Systems;
originally enacted in 1906 by 6 Edw. VII, C 41, and
superseded in 1908 by 8 Edw. VII, C 49, and

- 2) Section 331 of the Consolidated Municipal Act, 1903, enacted by 3 Edw. VII. C 19.

After the peak in 1921, there was a period of consolidation during which the number of companies decreased. However, during this same period the number of telephones in service increased until the year 1929. The depression years that followed were hard, forcing many companies to give up their operations. Of those systems that did survive, many were unable to maintain their plant and equipment in good condition. The scarcity of equipment during World War II further deferred the maintenance work of the independent companies. At the end of the war, most of the more than 550 independent systems were in very poor condition.

The Provincial government, being concerned about this state of affairs, commissioned R. E. Smythe, P. Eng. in 1948, to undertake a preliminary study of the telephone service situation. The study revealed that service in many rural areas of the Province was poor and was not meeting the requirements of the fast-growing population.

In 1951, the Rural Telephone Act was passed (S.O. 1951 C. 80). It gave authority to the Hydro-Electric Power Commission to inquire into, survey, and report on ways and means of improving, extending and co-ordinating the rural telephone systems. The "Rural Telephone Committee was established pursuant to this Act, to carry out the task.

The Rural Telephone Committee tabled their report in 1953. This report confirmed the prior finding that there was a pressing

need for improved service in many areas, recommended that impetus be given by the Government to improve the service, and made some other specific recommendations.

With a few exceptions, the recommendations of the Committee were accepted by the Legislature in March, 1953. The Committee was instructed to prepare a draft revision of the Telephone Act incorporating those recommendations which had been accepted by the Legislature.

The new Telephone Act came into being July 7th., 1954, establishing the Ontario Telephone Authority. The Act charged the "Authority" with the responsibility of co-ordinating and assisting telephone systems to provide improved telephone service, particularly in rural Ontario. The "Authority" was to provide staff for the purpose of supplying the independent systems with engineering, accounting, and other technical assistance. The new Telephone Act also established the Authority, as a regulatory body, with certain stated regulatory and supervisory powers and responsibilities. The Authority assumed the duties relating to telephone systems from the Ontario Municipal Board (descendants of the Ontario Railway and Municipal Board).

Once in operation, one of the aims of the Authority was to encourage systems to amalgamate, to ensure viable economic units which would have the ability to attract adequate financing, employ qualified personnel, and modernize equipment. Modernized equipment was necessary if interconnection with the larger networks was to be made possible, without degrading the service provided by such large networks (including Bell).

3. Regulation by Ontario Telephone Service Commission

The 1954 Telephone Act was amended in 1960, C 120 by changing the word "Authority" to the word "Commission"

2(1) The body corporate known as the "Ontario Telephone Authority" is continued and shall be known as the "Ontario Telephone Service Commission".

The present day Commission consists of four members and a secretary. It holds regular meetings to hear applications made under the provisions of the Telephone Act. Public Hearings are conducted in various parts of the Province when it is necessary to hold a local hearing at a convenient location.

The regulatory and supervisory duties of the Commission are very similar to those of the Ontario Municipal Board. Under section 11 the Commission "has exclusive jurisdiction to hear and determine any differences between two or more telephone systems or municipalities in respect of the establishment, extension, operation or maintenance of a telephone system or in respect of any act, matter or thing required to be done by them, or any of them, under this Act, and to make such orders in respect thereof as it deems proper."

The Commission also has the power to enquire into the sufficiency of rates and to hear and determine any complaints. Discrimination is forbidden under the Act. Approval of the Commission is necessary for all rates and tolls and also for the sale, disposal, merger or transfer of a telephone system.

There is also provision made in the Act for review by the Lieutenant Governor in Council and by the Court of Appeal.

18. The Lieutenant Governor in Council may at any time upon petition of any party, all parties first having been heard, vary or rescind any order or decision of the Commission whether the order or decision was made inter parted or otherwise, and any order that the Lieutenant Governor in Council makes with respect thereto is binding upon the Commission and all parties. R.S.O. 1960, c. 394, s. 18.
19. (1) An appeal lies from the Commission to the Court of Appeal upon any question of jurisdiction or upon any question of law, but not such appeal lies unless leave to appeal is obtained from the court within one month of the making of the order or decision sought to be appealed from or within such further time as the court under the special circumstances of the case allows after notice to the opposite party, if any, stating the grounds of appeal.
(2) Upon such leave being obtained, the Registrar of the Court of Appeal shall set the appeal down for hearing at the next sittings of the court and the party appealing shall, within ten days, give to the parties affected by the appeal, or to the solicitors by whom such parties were represented before the Commission, and to the Commission notice in writing that the case has been so set down and the appeal shall be heard and disposed of by the court as speedily as practicable.
(3) On the hearing of an appeal under this section, the court may draw such inferences as are not inconsistent with the facts expressly found by the Commission and necessary for determining the question of jurisdiction or law, as the case may be, and shall specify its opinion to the Commission and the Commission shall make an order in accordance with such opinion.
(4) The Commission is entitled to be heard by counsel or otherwise upon the argument of any such appeal.
(5) The Commission or any member thereof is not liable for costs in connection with any appeal or application for leave to appeal under this section. R.S.O. 1960, c. 394, s. 19.

The Telephone Branch of the Department of Agriculture and Food consists of two Divisions, (the Engineering Division and the Commercial Division). These Divisions have staff who provide engineering and commercial assistance to the telephone companies operating under Provincial jurisdiction.

The policy of the Authority and the Commission has been to encourage companies that desired to continue in business, and who had good prospects of successfully modernizing their plant and becoming financially sound operations, to do so. Companies which for various reasons decided not to continue in business, either sold the system to a larger company, amalgamated with neighbouring systems, or vacated the field and allowed some other company to take over the service. In this way, the number of companies operating in Ontario decreased from a total of 465 in 1953 to 66 in 1969. Although the number of independent telephone companies decreased, the total number of telephones has increased due to the growth of the remaining systems left in the field.

All these activities have resulted in considerable improvements in service to rural customers.

4. Other Provincial Telephone Legislation

(i) Directly associated with the activities of the Commission, under the Telephone Act, are the activities of a Corporation established pursuant to the Ontario Telephone Development Corporation Act, R.S.O. 1960, c. 28, (first enacted in 1955). The Corporation is another agency through which assistance is extended to rural telephone systems. The object of the Corporation is "the improve-

ment of telephone systems in Ontario."

Telephone systems which are unable to rehabilitate themselves or to make arrangements to sell to another telephone system may be taken over by this government Corporation. Its function is to rehabilitate such systems and when this has been accomplished, work out an arrangement under which the revitalized system could be absorbed by an existing efficiently operating system. The Corporation did purchase a number of small systems in the Madawaska Valley (where several uranium mines were operating) and developed these into a viable operating entity. This new system was later sold to the Bell Telephone Company.

(ii) Under the Public Utilities Act, R.S.O. 1960, C. 335 section 65, the Council of a Municipal Corporation that owns or operates, or is about to establish a telephone system may by by-law, passed with the assent of the municipal electors, provide for entrusting the construction of the work and the control and management of it to a commission to be called "The Public Service Commission" of the relevant municipality or to an existing public utilities commission established under the Public Utilities Act.

(iii) The Municipal Act, R.S.O. 1960, C. 249 is also concerned with telephones. Section 379, subsection 1, paragraph 96 of the Act provides that by-laws may be passed by the councils of local municipalities for regulating and for authorizing the erection and maintenance of telephone poles across or along on any highway or public place. Under section 379, subsection 1, para-

graph 104, by-laws may be passed for authorizing the erection of public telephone booths upon the highway or lands of the municipality upon such terms and conditions as may be agreed upon; and for making such annual or other charge for the privilege conferred as the council may deem reasonable. Section 391, subsection 6, states that by-laws may be passed by the councils of counties for permitting, and regulating the erection and maintenance of telephone poles on the highways under the jurisdiction of the council.

B. Ontario Northland Transportation Commission

1. Formation

The Ontario Northland Transportation Commission owns and operates telephone and telegraph lines and services under the Ontario Northland Transportation Commission Act. (Chapter 276 revised statutes of Ontario 1960). Section 7, subsections 2 and C of this Act read as follows: -

"construct, complete, equip, maintain and operate telephone and telegraph lines and with respect thereto has and shall exercise all the powers that may be exercised by a Railway Company under the Railways Act or by any general Act of the Legislature affecting railways for the time being in force, or by a telephone or telegraph company incorporated under the general laws of Ontario;"

This section of the Act confers upon the O.N.T.C. all of the powers that may be exercised by a Railway Company under the Railways Act as well as by a Telephone or Telegraph Company which may be incorporated under the General Laws of the Province of Ontario.

The present Commission is the successor to the Temiskaming and Northern Ontario Railway which information is contained in Section 2, subsection 1 of the O.N.T.C. Acts referred to. The Temiskaming and Northern Ontario Railway was incorporated in 1902 by an Act of the Legislature of the Province of Ontario.

The Ontario Northland Transportation Commission also owns and operates telephone and telegraph lines and services into Noranda, Quebec under authority of the Nipissing Central Railway which was originally incorporated by an Act of the Federal Government assented to on the 12th of April, 1907 as is found in Chapter 112 of the 1907 Statutes of Canada.

The Ontario Northland Transportation Commission provides basically long distance telephone service and owns only two small dial exchanges in its serving area plus a limited number of toll station lines in the Moosonee, Cochrane, Hearst and North Bay areas. Total telephones in service end of 1969 was 1,700. Under the terms of written agreements, the local exchange service in the serving area is provided mainly by Northern Telephone Limited (Bell Canada subsidiary) and the Public Utilities Commission at Cochrane and the Abitibi Paper Company at Iroquois Falls.

2. Operating Territory

- (a) The Commission is authorized to provide service just as any telegraph or telephone company incorporated under the general laws of Ontario. Telephone companies are governed by the Telephone Act being Chapter 394 R.S.O. 1960 and

territorial jurisdiction is not limited by this Act. Service in Quebec is by Federal Charter associated with the charter of the Nipissing Central Railway in its serving area to Noranda, Quebec.

- (b) Actual operating territory is mainly Northeastern Ontario bounded by North Bay on the south, Winisk on the North, Flynn Lake on the West, and Noranda on the East. Interconnection of long distance lines with Bell Canada occurs at the North Bay and Flynn Lake boundaries.

(See Appendix "A" and "B" for area of operation and facilities respectively.)

Regulation

There is no external regulatory authority established to control the telecommunications operations of the O.N.T.C. in Ontario. It is self regulated through its cabinet appointed commission. In Quebec, the telecommunications operations are Federally regulated. Tariffs are normally accepted as established by Bell Canada. The O.N.T.C. operates as a separate business enterprise arranging its own financing but with borrowing limits requiring approval of the Lieutenant-Governor in Council. Capital and operating budgets must be submitted to Cabinet each year for approval.

There is also no external regulatory authority over the technical aspects of telecommunications services. The O.N.T.C. telecommunications branch, in co-operation with other inter-

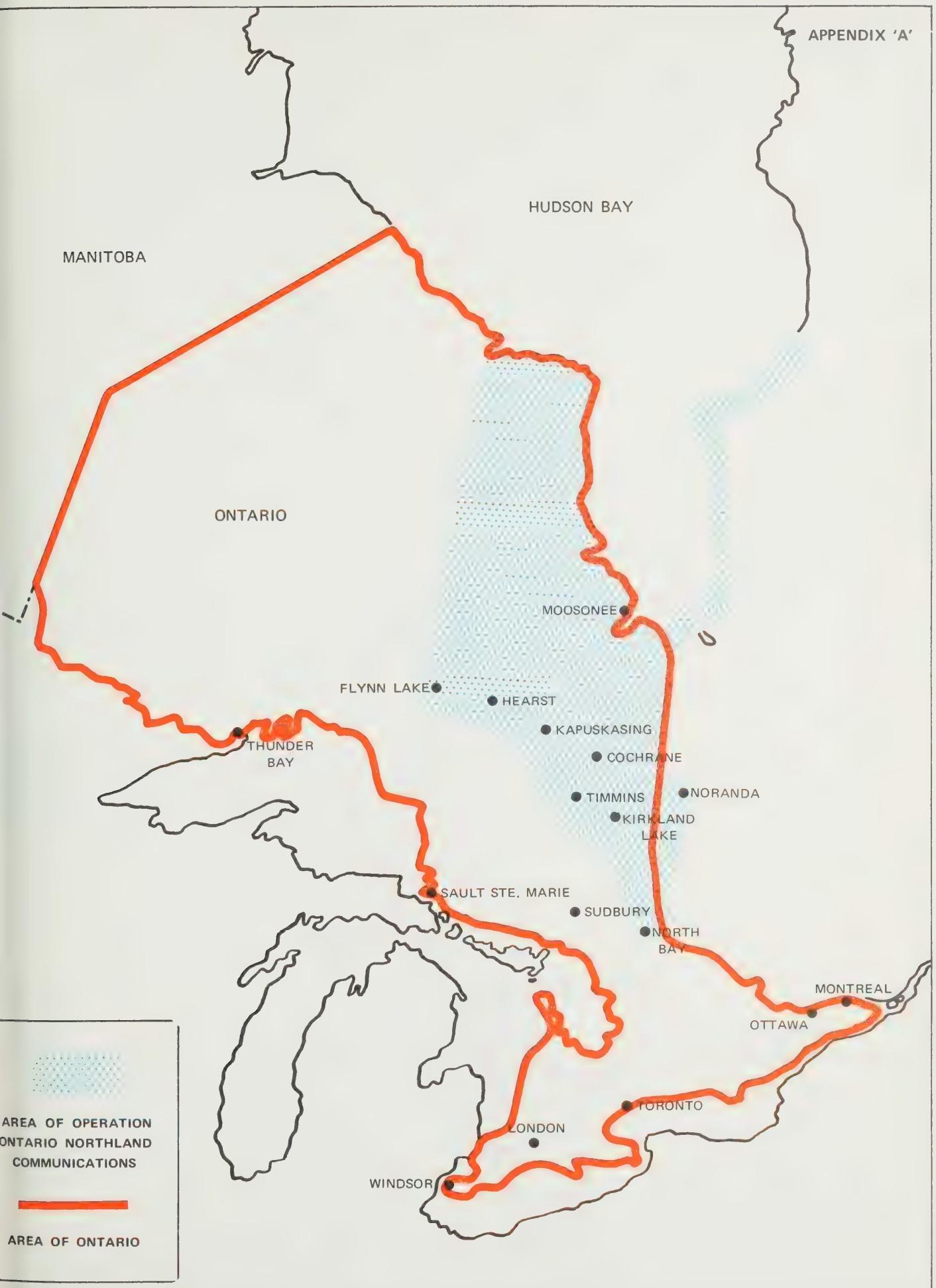
connecting telecommunications companies, adopts designs and standards of equipment and service which are compatible with the objectives of the total telecommunications network. In Cases of lines crossing navigable waters, the Navigable Waters Protection Act must be complied with. Crossings of railways under Federal jurisdiction must comply with the Railway Act as administered by the Canadian Transport Commission. Provincially the O.N.T.C. provides railway services and has internal control of communications lines crossing its railway lines. Crossings of oil and gas pipelines under Federal jurisdiction must comply with the National Energy Act as administered by the National Energy Board. Crossings of roads and highways requires negotiation with the particular Provincial and Municipal authorities involved.

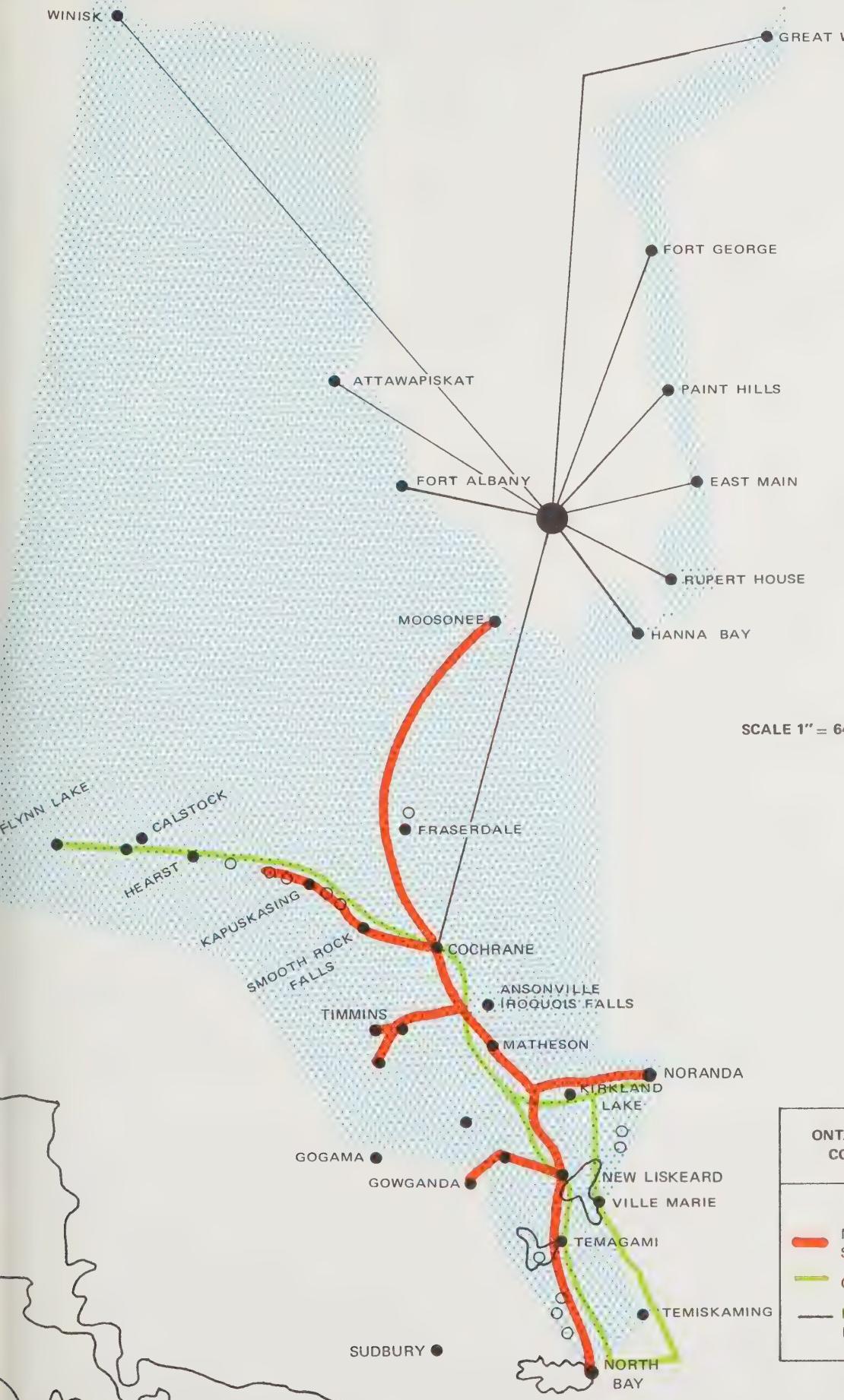
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Student-at-law,
Department of Transport (Ontar

E. C. Pearce, P. Eng.,
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Commission.

15 July, 1970.

The kind assistance of Mr. R. V. L. Handforth, P. Eng., and of Mr. T. Grindlay of the Department of Agriculture and Food, is gratefully acknowledged.



ONTARIO NORTHLAND
COMMUNICATIONS

FACILITIES MAP

- MICROWAVE RADIO SYSTEM
- OPEN WIRE SYSTEM
- HIGH FREQUENCY RADIO SYSTEM

TELECOMMUNICATIONS

Study 1(c)

Concept of a Telecommunications Carrier

The Department of Communications

Telecommission

Study I (c)

Report

on the

Concept of a Telecommunications Carrier

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Ottawa, 1971

This Report was prepared for the Department of Communications by a project team made up of representatives from various organizations and does not necessarily represent the views of the Department or of the federal Government, and no commitment for future action should be inferred from the recommendations of the participants.

This Report is to be considered as a background working paper and no effort has been made to edit it for uniformity of terminology with other studies.

Introduction

The Minister of Communications in 1969 authorized a broad and intensive study of Canada's telecommunications industry. This program known as the 'Telecommission' embraces nearly fifty studies which explore the many social, economic, legal, technical and environmental aspects of telecommunications in Canada and as it relates to other nations.

This study, the Concept of a Telecommunications Carrier, was conceived because of the need to define the role of the telecommunications carrier. The meaning of the phrase 'telecommunications carrier' must be well understood when formulating policy and drafting legislation and by the courts; and have a significant connotation for telecommunications users when conducting business through telecommunications.

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Appendices

This includes a copy of each submission presented to the Telecommission by a regulatory body, agency, or corporation which employed the Terms of Reference 'Concept of a Telecommunications Carrier', Study I (c).

The submissions are included as part of this study and appear in alphabetic order as shown in Section I on the next page which lists the contributing agencies and corporations.

Section I

List of Agencies and Corporations making submissions related to the Terms of Reference for the Study - Concept of a Telecommunications Carrier.

Provincial Government Departments and Regulatory Bodies

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Note: Attached to this study is a copy of each submission received from the above bodies.

Section II
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- Canadian National Telecommunications - Mr. J.J. Dubé
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- Canadian Pacific Telecommunications - Mr. C.W. Taylor
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- Telesat Canada - Mr. J-C. Delorme
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Solicitor
- Trans-Canada Telephone System - Mr. F. Ibey
Assistant Vice-President,
Regulatory Matters,
and associates
- Mr. T.Y. Strath
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Section III

The development of the Terms of Reference

The development of the Terms of Reference pointed up the immediate need for clarification of the purpose for which the definition of the "Concept of a Telecommunications Carrier" would be used.

The purpose is to define clearly the concept of the 'Telecommunications Carrier'. The meaning of this phrase must be well understood when formulating policy and drafting legislation and by the courts; and have a significant connotation to the telecommunications users when conducting business through telecommunications.

The telephone and telegraph companies perform a variety of functions under the authority of corporate charters. Their corporate activities present a combination of functions which leads them into many different avenues of business, i.e., computer, manufacturing, and consulting services in addition to telecommunications.

Consideration of the above described broad corporate activities led the Project Team to the conclusion to proceed on the basis of a functional approach to the definition of the 'Concept', rather than employing the all-embracing corporate activity approach.

The carrier function is therefore defined within this study. It was recognized that other studies would define the computer, manufacturing, and research and development functions; and that the broadcasting function* had been defined within the Broadcasting Act as administered by the Canadian Radio-Television Commission.

The possible implementation of a combination of the above functions within one company as may be permitted under the terms of its corporate charter was agreed to be not within the purview of this study.

* See TCTS, CN/CP Telecommunications statement on specific exclusion under "Franchise" pp 21 of this study.

The phrase 'telecommunications carrier' was herein developed in place of the presently used phrase 'common carrier' for the following reasons. The 'common carrier' phrase has a precise legal meaning. However, it is not descriptive in any real sense of the concept of a telecommunications carrier in Canada. The Project Team saw no valid reason for continuing or fostering indiscriminate use of the 'common carrier' phrase.

The phrase 'common carrier' as presently understood, and as developed through years of use in the English, American and Canadian Courts includes two elements which are difficult to reconcile with the 'telecommunications carrier' concept. The first is that of strict or absolute liability for loss of or damage to the goods carried. The common carrier physically transports and delivers goods in an usually unchanged and continually recognizable physical condition. Secondly, the common carrier can usually evaluate and insure these goods in a realistic fashion. However, in the case of a telecommunications service, the message may be electronically massaged to a different form during the conveyance process. Further, the message is relatively intangible and hence it is difficult to appraise its worth. It is difficult for the telecommunications carrier to insure a message because responsibility for error in message initiation, transfer and reception is not easy to establish.

For these reasons, and because the means of conveyance are quite different, i.e., an electronic highway versus a vehicular highway, the Project Team hereinafter employs the term 'telecommunications carrier' within this study, and recommends its inclusion in future legislation and regulations as a standard recognized term.

The Terms of Reference which follow evolved from the needs as determined by the Project Team:

- a) the need to define 'telecommunications'
- b) the need to define 'telecommunications carrier services'
- c) the need to identify in a brief and succinct fashion the 'telecommunications carrier function'
- d) the need to recognize the telecommunications carriers' obligations to the users for the services which it provides.
- e) the need to determine the rights of the telecommunications carrier when performing its function.

Terms of Reference

Concept of a Telecommunications Carrier

Employing the following headings, we shall postulate what a telecommunications carrier should be:-

- A. Definition of Telecommunications
- B. Definition of Telecommunications service
- C. Definition of Telecommunications carrier function
- D. Definition of Telecommunications carrier obligations and rights.

(1) Obligations to Users

- * a) Equitable System of Rates
- * b) Equitable connection of customer owned equipment and systems
- c) Provision of service on demand
- d) Liability for telecommunication malfunction or misuse.
- * e) Legal right of user to privacy.
- f) Quality of service and continuity.

(2) Rights

- a) Franchise
- b) Right of way
- c) Right of access to capital market
- d) Right to plan construction
- e) Right to establish rates.

* These elements are the specific subject of other Telecommission Studies.

The Definitions

Section IV (a)

Definition of Telecommunications

A cornerstone necessary to the development of the Concept of a Telecommunications Carrier is the meaning of the word "Telecommunications". The history of this word has been discussed; its incorporation and use in various legal documents has been reviewed and examined; the semantics of the word within the various definitions were vigorously debated; and the word was considered in the light of present and future technology.

A general consensus * of the Project Team has been achieved that the following definition be accepted:

"Telecommunications means any transmission, emission, or reception of signs, signals, writing, images, or sounds or intelligence of any nature by wire, radio, visual, or other electromagnetic systems".

The above definition, accepted by the International Telecommunications Convention - Montreux (1965), is now incorporated in the following Canadian Statutes (in some cases with minor modifications):-

Canadian Overseas Telecommunications Corporation-
Telecommunications Act (Chap. 42, Sect.2(j))

Interpretation Act (Chap. 7, Sect. 28)

Radio Act (Sect. 2 (i))

Telesat Canada Act (Chap. 51 (e))

* See CN/CP Telecommunications Submission for exception

Although the foregoing definition was found to be generally acceptable, the telecommunications carriers in their own submissions (See Appendices) suggested the inclusion of "acoustical means" (Telesat Canada) and substitution of "information" (CN/CP Telecommunications) for "sound and intelligence" as improvements on the above definition, reflecting their consideration of technological and social changes that should be recognized by this definition.

The Ontario Telephone Service Commission takes the broad approach to defining 'telecommunications' as 'by means of energy to convey intelligence over distances beyond the range of unaided senses.'

The positions of the provincial regulatory bodies range from a finite definition through to a broad general approach as noted above. The importance of agreeing, at the outset, upon a definition of "Telecommunications" is highlighted by the Provincial Secretary of the Province of Nova Scotia in his letter of 19 March 1970 to the Minister of Communications in which he said:

"I note that the first point to be considered by Telecommission under Study I (c) is the formulation of a definition of Telecommunications. This seems to me to be a fundamental matter to be considered and certainly until that point is reached the Province would hesitate to comment on the substance or principles of control and regulation."

Section IV (b)

Definition of Telecommunications Service

The evolution of the 'Concept of a Telecommunications Carrier' requires a definition of the service which should be provided by the telecommunications carriers.

"Telecommunications Service is a service, the predominant purpose of which is the transmission, emission, or reception of signs, signals, writing, images, or sounds, or intelligence of any nature by wire, radio, visual, or other electromagnetic systems".

The Project Team generally accepted * this definition subject to preferences for modifications that reflect the options suggested by the telecommunications carriers and others in the definition of "telecommunications" as noted previously.

* See CN/CP Telecommunications Submission for exception

Section IV (c)

Definition of Telecommunications Carrier Function

The function of a telecommunications carrier is the provision, for compensation, of telecommunications service to others, including any function incidental thereto by means of any appropriate facility, apparatus, method, or instrumentation.

The above definition presents a general consensus* of the opinion of the Project Team; however, it is worthwhile noting the content of the submissions concerning this important aspect of the 'Concept of a Telecommunications Carrier' as presented by provincial regulatory bodies and other agencies. The points expressed by the many submissions offer a wide spectrum which reflects the geographical as well as the social and technical interests of the contributors. Extracts from their submissions (other than those participating in the Project Team) are quoted below:

Newfoundland - Board of Commissioners of Public Utilities:

"Telecommunications Carrier Function is the action or activity of a person or institution which undertakes to provide telecommunications service for the public or under contract for hire, gain or reward pursuant to the terms of a franchise."

Prince Edward Island - Public Utilities Commission:

"Relative to the definitions set forth under items A, B, and C, it is the opinion of this Commission that these could only be defined by a Study Group or Committee satisfactory to all jurisdictions in which they are to be used. This Committee should consist only of members well qualified in the various branches of telecommunication, particularly if anything other than very loose definitions are to be evolved."

* See CN/CP Telecommunications Submission for exception

Ontario Telephone Service Commission:

"A Telecommunications Carrier shall function to provide telecommunications of one or more types without discrimination as to user and in full respect of all users' privacy."

Ontario Northland Transportation Commission:

"Telecommunications Carrier Function is the provision of telecommunications service to others for compensation."

Saskatchewan Telecommunications:

"The basic function of the carrier is to furnish the medium facilities required for telecommunications. These facilities encompass the organization, plant and personnel necessarily associated with supplying the medium. Ideally these will include all facilities and equipment which, by reason of the technology involved and the co-ordination divided in ownership or responsibility without a penalty in the quality or cost of the message."

Province of Alberta:

"The function of a telecommunications carrier is the provision of telecommunications services to others for compensation."

Section V

Telecommunications Carrier Obligations and Rights

An organization which performs the telecommunications carrier function and hence provides telecommunications services will have characteristics which cause it to be recognized as a public utility. These characteristics set it apart from other commercial enterprises. Principal among these characteristics are the carriers obligations to the user - and the rights of the carrier.

Following is a consideration of the submissions (See Appendices) made to the Telecommission concerning those obligations and rights which the federal government officials on the Project Team have selected as major contributions towards the development of a framework to support the 'Concept of a Telecommunications Carrier'.

1. Telecommunications Carrier Obligations to Users

a) Equitable System of Rates

The system of rates is being examined in another separate Telecommission study. However, it is worth noting the range of opinions of the contributors to this Telecommission study in order to better understand the Concept of a Telecommunications Carrier.

Newfoundland - Board of Commissioners of Public Utilities:

"Pricing is the final step in the rate process and one of the main reasons for Government regulation of telecommunications carriers is to insure that users will be charged an equitable system of rates. The gross operating revenue required by the carrier is determined primarily by the wages demanded by workmen, the price demanded by suppliers or plant and equipment and the return demanded by the investors. If these demands are not met, service will be withdrawn and the supply of additional materials and capital will be cut off or at least curtailed. Except in the short run therefore carriers are able to influence very little the total amount of money which must be paid by users of their services."

Newfoundland - continued

"Carriers, however, can and do influence how the total burden is shared amongst the different classes of users. This is done by means of cost of service and market surveys. The first estimates the cost of furnishing service of different descriptions or under different circumstances and the second estimates elasticity in demand. The objective of the carrier is to maximize the gross operating revenue derived from the total capital employed in the undertaking, and given a fixed rate of return this objective minimizes user charges which the carrier can claim to be equitable."

"The regulatory body, however, may decide after investigation that some service must be upgraded or that public convenience and necessity require extensions of service that do not promise to be compensatory. In such cases the carrier may be ordered to reduce rates for classes of service deemed to be inadequate or increase rates for certain classes of service to compensate the carrier for extending service to areas which are not self-supporting. The obligations on the carrier to charge equitable rates are therefore two fold. The first is ordinarily imposed as a condition of the franchise which grants the right to serve and the second by regulatory orders which modify the discretion allowed under the first."

"The determination of an equitable system of rates is complicated by the fact that telecommunications carriers ordinarily furnish service to users in more than one regulatory jurisdiction. This is particularly true of the telephone carriers. Rates for local exchange and toll calling within the carriers service area are regulated by a provincial authority when the service area is within one province or by a Committee of the Canadian Transport Commission when the service area extends beyond one province. Rates for toll calling beyond the service area are determined by agreement amongst the carriers and these rates are not subject to regulation. The revenue derived from them constitute a substantial portion of each telephone carriers gross operating revenue as this is relatively a fixed amount at any given time. The rates which are subject to regulation must produce sufficient revenue to provide the balance required to meet the total revenue requirements. It follows therefore that regulatory authorities have no power to inquire into whether telephone carriers are observing their obligation to charge equitable rates for toll calling outside their service area and that this in turn restricts the power to investigate the reasonableness of rates charged for services furnished within the jurisdiction of such bodies."

Ontario Northland Transportation Commission:

"When a telecommunications carrier is obliged to furnish certain telecommunications services throughout its operating territory, the rates charged for such services should be just and reasonable. Such rates should not be unjustly discriminatory and, under substantially similar circumstances and conditions, similar rates should be charged to all persons."

"Rates for such services should be based upon the principle that the territory served by a carrier is treated as a unit. The fundamental advantage of this method is that the flexibility it provides in the design of rate schedules will result in more people having better service made available to them at reasonable prices because inordinate disparities due to terrain, location, population density, etc., tend to be averaged out."

"Where services are jointly provided by more than one carrier through two or more adjacent operating areas, it is desirable that the rates for each service be uniform e.g., long distance service. It follows then that the revenue derived from the total service should be shared amongst the carriers who provide the service in proportion to their respective costs of providing the service."

Ontario Telephone Service Commission:

- " i) Rates should be as low as practically possible.
- ii) Within the limits of practicability, a rate system should safeguard against discrimination among sectors of the public economy.
- iii) Rates charged for the component parts of a telecommunications link should be fairly apportioned, so that revenue accruing from one part is not used to subsidize another, without respect to whether one or more ownerships are concerned.
- iv) Rates charged for one telecommunications service should not provide excess revenue for the subsidization of another service, it being understood that the expenses of research and development may fittingly be imposed as a proper charge upon the carrier's overall revenue from all services being provided."

b) Equitable connection of customer-owned equipment and systems

The connection of customer-owned equipment and systems to the telecommunications carrier system is being examined in another Telecommission study. However, it is worthwhile noting a discussion of the problem which has been contributed to this Telecommission study by the Saskatchewan Telecommunications (which is unique in that it is a provincial crown corporation operating as a telecommunications carrier and reporting directly to the provincial government without a formal regulatory authority), and by the Canadian Cable Television Association.

Saskatchewan Telecommunications:

"Equitable connection of customer-owned equipment and systems. The arguments for carrier control over such equipment in the public telecommunications service are mainly associated with the fact that customer-owned equipment amounts to a severance of control over the medium. The greater the number of severances to the medium the greater is the risk of increasing the cost and decreasing the quality of the "message". Obviously the problems of compatibility, fault testing, repair, maintenance, supervision, control and co-ordination become more complex when there is a severed responsibility over equipment performing an inseverable function."

"The opposing argument stems from the inherently monopolistic nature of the public telecommunications service. This is the problem of control over innovation. It is impossible to divorce the medium from technology and technology from innovation. Much of the innovation is associated with terminal equipment which is essentially part of the medium. The two extreme positions relative to control over innovation are: (1) permitting the customer to choose his terminal equipment from the competitive market, or (ii) to include in the carrier's franchise the right to own and provide all of the terminal equipment. There are difficulties in both extremes - the one creating problems associated with divided ownership and control of the medium and the other the question of stifling innovation."

Saskatchewan - continued

"Saskatchewan Telecommunications' view is that, in general, terminal equipment is an integral part of the medium, rather than part of the "message" and consequently is part of the function of the carrier rather than that of the customer. The problems associated with customer-owned equipment will produce cost and efficiency penalties far offsetting any advantage gained in innovation."

"However, in the case of specialized services, which are not part of the general public service, the connection of customer-owned equipment is desirable provided that the integrity of the network is safeguarded."

"Attempts to foster innovation should not include any action which would impair the integrity of the telecommunications service."

Canadian Cable Television Association:

"There should be an obligation to accept reasonable connections of customer-owned equipment and systems which meet appropriate engineering standards."

c) Provision of Service on Demand

The Project Team is generally in agreement that the following basic principle should govern a telecommunications carrier's obligation with respect to providing service:

In accordance with the provision of its charter or other enabling legislation, a telecommunications carrier is obliged to furnish certain telecommunications services throughout its territory. It should also be obliged to provide such services on a just and reasonable basis and without undue delay. All other telecommunications services normally provided by the carrier should be provided as promptly as the availability of suitable equipment and facilities permit.

Qualifications applying to the above basic principle concern the possibility of the users misuse of equipment, or nonpayment of bills, or placement of unusual financial burden on the carrier, when the basic obligation of service on demand may not apply.

There is however the need for a concomitant provision that the user shall have, in a reasonable amount of time, at a cost which the user can afford, the right of appeal to a neutral body (e.g., regulatory body or court) of a decision by a telecommunications carrier to discontinue service.

d) Liability for Telecommunications Malfunction or Misuse

Discussion of liability usually results in two positions being taken, — the position of the user and the position of the supplier. Such is the case with the broadcasters and the telecommunications carriers. The Canadian Association of Broadcasters in their submission postulate the following:

"Be that as it may, Parliament, by virtue of the Railway Act R.S.C. 1952, c. 234, as amended, has now in effect, declared that telecommunications carriers subject to federal jurisdiction are common carriers. The significant change in this regard was the introduction of Section 381 A, which is identical to Section 353 of the same Act but applicable to Railway companies,

"318-A (1) No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of any traffic shall, except as hereinafter provided, relieve the company from such liability, unless the class of contract, condition, by-law, regulation, declaration or notice has been first authorized or approved by order or regulation of the Commission."

"This Section goes so far as to require the telecommunications carrier to obtain approval of any and all contracts proposing to limit liability, and presumably such restrictions apply to private wire service contracts as well as services offered to the public at large."

The Trans-Canada Telephone System takes a somewhat different view:

"A telecommunications carrier should undertake to make every effort to ensure the conveyance of all information with speed and accuracy. However, even with continuing advances in telecommunications research and technology, it is not technically possible for a carrier to guarantee the perfect conveyance of information. Limitation of liability arising from malfunction of a telecommunications carrier's equipment, from misuse of its service or from any other cause has long been legally authorized and should be continued."

The federal government officials on the Project Team are of the opinion that despite the difficulties which will be encountered in attempting to resolve the problems to the satisfaction of the user and the supplier, a realistic practical form of insurance program should be developed particularly in view of the accelerated trend towards business communications and record-keeping via electronic means. The user must be protected against a major economic disaster which could happen through some mistake or misuse of telecommunications.

Mr. R. Olson of the Justice Department felt that the burden of loss should be shared as it is in other areas where similar problems with individual liability exist. Consideration ought to be given to a "pool" scheme wherein all users contribute a portion of the total cost of message service to protect against a mistake or misuse of major impact. A fund could be established by this method and could also be used as a form of unsatisfied judgment fund during the period when the liabilities were being sorted out.

The telecommunications carriers expressed a willingness to assist in any study directed towards resolution of the problem.

e) Legal Right of User to Privacy

This subject has received comprehensive consideration through another Telecommission study.

The general position of the telecommunications carriers with regard to privacy is reflected in the statement which Telesat Canada provided to the Telecommission for this study of the Concept of a Telecommunications Carrier:

"Telesat Canada respects the rights of its potential users to privacy and will take every reasonable precaution to ensure that their privacy will be respected. Telesat Canada subscribes to the principle that those persons handling or having access to the transmission of confidential material should be required to take an oath of secrecy. To guarantee absolute privacy in light of the human factor and the increasing complexity in electronic eavesdropping devices would be unrealistic."

"Telesat Canada accepts the principle, as stated by other carriers; that 'a telecommunications carrier should not have the right to control the content nor influence the meaning of information transmitted by it unless specifically instructed otherwise by the originator or author of the information.'".

f) The Quality of Service and Continuity

There is unanimous agreement that a high standard of quality of telecommunications service is necessary and that a regulatory body should review these standards and the telecommunications carriers' performance to ensure satisfactory service to the users. This position is stated similarly by the Canadian National/Canadian Pacific Telecommunications and the Trans-Canada Telephone System in their submissions to the Telecommission as follows:-

"A telecommunications carrier should provide service having satisfactory quality and continuity characteristics. These characteristics should be relatively uniform under substantially similar conditions."

"The expectations of the public with respect to quality and continuity of service are continuously rising. A carrier should plan the development of its system and operations to meet these expectations."

"A carrier should set understandable performance objectives for its system which are just and reasonable to the carrier, its customers and its regulatory authority. The achievement of these objectives should be reviewed periodically with the regulatory authority."

Section V

2. Telecommunications Carrier Rights

a) Franchise

Franchise is a many splendoured thing. The varying interest and opinions on franchise can be seen from the pertinent comments noted below:

Telesat Canada see franchise as a privilege:

"The franchise of a common carrier is contained in its incorporating charter; for Telesat this is the Telesat Canada Act. Such a franchise is a special privilege granted by the government to undertake a telecommunications enterprise".

The Trans-Canada Telephone System considers that a franchise is the right to do business:

"A telecommunications carrier should require no franchise other than the right to carry on its business in accordance with the provisions of its charter or other enabling legislation".

The Trans-Canada Telephone System and Canadian National/Canadian Pacific Telecommunications note a specific exclusion:

"A person licensed under the Broadcasting Act (1967-68 Statutes of Canada, chapter 25) who distributes radio or television signals for reception by the public, either by air or through cable distribution systems, shall not, insofar as such person is so engaged, be deemed to be a telecommunications carrier".

Canadian National/Canadian Pacific Telecommunications further state two criteria:

"The criteria used by the Federal Communications authority in approving or disapproving a franchise application should be clearly set out in legislation and should take into account:

- 1) public interest and need including economic and technical factors
- 2) ability of existing Telecommunications Carriers to properly satisfy interest and need."

The Ontario Telephone Service Commission envisages franchise as a no-competition situation:

"Provision of franchise to a carrier shall mean that the carrier will not be subjected to competition against the service which it is enfranchised to provide. This franchise shall be inviolate so long as the carrier adequately meets user demand for its service, and so long as its standard of service meets the degree of excellence demanded by its approved rate system. Consistent failure of the carrier to fulfil these requirements could result in its loss of franchise."

The Canadian Association of Broadcasters speaks of the consequence of the high capital cost:

"Exclusive area of operation. The franchise concept of telecommunications operations is a consequence of the high capital cost of such undertakings and the need to maximize the effective economic use and operation of such facilities. Having an exclusive franchise as to area of operations, telecommunications carriers in Canada are subject to either federal or provincial rate, plant and service regulation."

The Ontario Northland Transportation Commission notes the boundary problem:

"A telecommunications carrier's franchise should specify clearly the boundaries of the area served and the types of service to be provided."

Ontario Northland Transportation Commission-continued

"Where adjacent franchised areas are regulated by different bodies, there should be close co-ordination between the respective bodies in the establishment of regulatory policy."

The Newfoundland Board of Commissioners of Public Utilities sees it as a monopoly authorized by Government in order to provide the most economic services:

"The obligations of the Telecommunications Carriers to users are predicated upon the granting of a limited monopoly by the appropriate government authority. This grant is normally referred to as a franchise, and is necessary because Telecommunications services are deemed to be required for the public convenience and necessity and that if they were granted by competitive private enterprises the costs of the services would be higher than if they were provided under a regulated monopoly. The reason for this is the greater investment in plant and equipment in relation to annual gross operating revenue than other industries."

Saskatchewan Telecommunications are concerned with the geographic area and scope of services within franchise:

"There are two basic factors in franchise, namely: geographic area and scope of telecommunications services. The geographic area is relatively simple to define, whereas the scope of services problem is very complex. The traditional telephone and telegraph functions are no longer the severable functions they once were. Technology permits and economics demand that the network facilities provided by the telephone system to serve virtually every place of residence and business in Canada be also used to provide many new services in addition to voice communications. Saskatchewan Telecommunications believes that these universally used services constitute a natural extension of the traditional telephone monopoly and are properly the exclusive responsibility of the telephone system since it is singularly capable of providing them to every address."

The Canadian Cable Television Association expresses franchise in terms of the function:

"A regulated public carrier may be granted a franchise to perform a particular telecommunications function with terms appropriate to that function."

b) Right of Way

Right of Way means no more than that which is essential to carry out the obligations conferred upon the telecommunications carrier.

Right of Way concerns not only the need for traverse of land, but also of clear airways through which microwave transmission may pass, e.g., not blocked by high-rise buildings.

The Province of Alberta sums up the concerns of the telecommunications carriers for compatibility of routing with the rights of land owners:

"The Government is of the view that the telecommunications carrier should be able to obtain and use right of way for telecommunications facilities at the lowest possible cost, consistent with the right of land owners. This may be accomplished through the placement of telecommunications facilities in ditches along the shoulders of highways. This is one of the most economical methods of providing facilities. There should also be expropriation rights for telecommunication carriers, subject to appeals concerning the necessity for and compensation to be paid for the rights of way."

"Legislation should also be considered for a right of way in the air to protect the microwave transmission routes of the telecommunications carriers. Excessive costs can be incurred by the telecommunications carriers which in the end must be borne by the users if it becomes necessary to carry out major microwave re-routes."

Canadian National/Canadian Pacific Telecommunications, Ontario Northland Transportation Commission, Trans-Canada Telephone System and Telesat Canada add a further dimension to the concept of right of way, i.e., the right to use the frequency spectrum.* Their position is summed up by the comments of the Ontario Northland Transportation Commission:

"Right to the use of portions of the radio spectrum is essential to the carrier. This should include the right of access to sufficient suitable radio spectrum required to meet long term service requirements and should be subject only to technical limitations and long term changes in technology."

The economic necessity of sharing right of way with various utilities, other carriers, and transportation agencies is recognized by the Project Team. This is an area where overall planning is particularly required if the possible economies of construction are to be realized.

The Ontario Telephone Service Commission states:

"Provision for telecommunications carrier's use of right of way, either solely or by sharing with other utilities, should therefore be established through legislation running parallel to that establishing its regulation."

Saskatchewan Telecommunications proposes:

"In the interests of efficient and orderly use of land and rights of way the same rights should be extended to the use of railway rights of way where telecommunication facilities can be accommodated without undue interference with the railway needs. Often the railway right of way is the shortest distance between two points and may be the most ideal route for buried telecommunication cable. Saskatchewan Telecommunications believes that railway rights of way should serve these purposes at reasonable rates competitive with rates on adjacent land."

* Subject of another separate Telecommission Study.

The federal government officials on the Project Team recognize that the telecommunications carriers require extraordinary privileges in order to conduct their business efficiently and economically, however, along with this must go extraordinary protection to the individual to ensure that he is fairly treated when these privileges are used. In this regard, it is noted that the historical distinction between private and public right of the individual to challenge the need for expropriation is receiving wider recognition in recent legislation and public discussion.

c) Right of Access to Capital Market

The question which must be faced is "to what extent does the government become involved with or help determine the magnitude and priority of expenditures of a telecommunications service which is monopolistic in character?

The present Railway Act administered by the Canadian Transportation Commission precludes stock issue by the telephone and telegraph companies prior to approval by the Commission of the issue, sale or disposition of capital stock. Variations of opinion on government involvement in this sensitive area are indicated in the following extracts.

Ontario Northland Transportation Commission, Trans-Canada Telephone System, and Canadian National/Canadian Pacific Telecommunications agree as follows:

"A telecommunications carrier should have the responsibility of determining the amounts, terms and conditions of capital to be raised. The intimate and continuing knowledge possessed by the carrier of its own business and of the capital markets is essential in determining sound financial policies which will provide adequate protection of its credit standing."

"The amount of capital which can be raised on reasonable terms, given prevailing market conditions, is mainly dependent upon the earning prospects of the carrier which are, in turn, dependent upon the demand for the carrier's services and the rates which it can charge."

Saskatchewan Telecommunications states that:

"The availability of capital depends on an adequate level of earnings. The access to the capital market and the cost of capital are factors which often determine whether geographic extension, expansion of services, modernization and innovation will occur in telecommunications. In the case of Saskatchewan Telecommunications, the provision of borrowed capital for these purposes depends on the government's order of priorities as between telecommunications and other demands for capital. A reasonable rate of return helps ensure the provision of such capital for telecommunications."

Telesat Canada notes that:

"Telesat Canada's right of access to the capital market is governed by the incorporating act which provides for the issuance of shares and the limitation on the authorized capital. Apart from the existing limitations, it is Telesat's position that the corporation's requirements for capital resources should be governed by the decisions of its shareholders. As the Government of Canada will be a substantial shareholder in Telesat Canada, it will have the opportunity to express its views in this capacity."

"Controls by government regulatory bodies should be exercised early to ensure an efficient utilization of capital resources."

d) Right to Plan Construction

A penetrating and considered discussion of the managerial prerogatives which are involved in the right to plan construction as well as the closely related right of access to capital market has been provided by the Ontario Telephone Service Commission:

" 'Right of access to capital market' should be considered along with 'Right to plan construction'. These are inextricably interwoven. The demand for capital is conditioned by the carrier's construction, expansion or maintenance requirements. The question therefore arises whether the right to plan construction should be reserved as an exclusive managerial prerogative of the carrier or be subject to regulatory scrutiny or approval. Control over expenditures can be exercised by regulating the amount of new debt or equity capital the carrier may issue, i.e., regulating the right hand side of the balance sheet or on the other hand regulating the need for capital by prescribing approval for capital projects themselves (the left hand side). Without approval for capital projects where new equity issues or new borrowings are reserved strictly to managerial judgment of the utility, the carrier may incur new debt which requires higher rates in order to be serviced and this is done as a fait accompli. Vesting a regulatory body with jurisdiction to pass on the necessity of capital expansion and requirements inevitably involves the fact of regulation constituting an interference with the judgment of management. This interference should be accepted, the degree of interference or regulatory scrutiny being made dependent on the circumstances. Except in the case of large once-and-for-all capital additions or capital expansions to a carrier's system, it is difficult to create a mechanism or method for regulatory approval both as to the timing, the amount or the need for capital expenditures. Unlike other utilities ordinarily the expansion of a telecommunications carrier consists of many small capital additions which aggregate a large amount, and an ad hoc line has to be drawn between involving the regulatory commission in assessing the necessity for every dollar of expenditure as opposed to no regulatory interference with spending whatsoever."

Ontario Telephone Service Commission - continued

"It follows however that if regulatory scrutiny will on occasion involve interference with management then the expertise possessed by the regulatory body and its staff must approximate the expertise enjoyed by the carrier and its staff otherwise the interference with the decisions of management may be technically incorrect and more than required to reconcile the demands of the public interest with the interests of the investors in the carrier or its creditors."

The Province of Alberta states the case for the carriers management of plant construction:

"Because of varying regional developments and their associated service requirements, the Government of Alberta believes that only the management of the local telecommunications carriers concerned are best able to be aware of the requirements to decide where, when and how new facilities and technological advances should be introduced into the telecommunications system. The right of a telecommunications carrier to plan its own construction program should be left with the carrier since it is the carrier who must assume any financial risk and responsibility."

Telesat Canada qualifies the area in which the carrier planning should be limited.

"The right of any carrier to plan construction should be permitted to be exercised only to the extent that it does not lead to a disorderly or wasteful duplication of facilities."

e) Right to Establish Rates

Although this is the subject of another Telecommission Study, it is worthwhile noting that a very basic standard must be realized before even the simplest of rate structure philosophies can be implemented. The Public Utilities Board of the Province of Alberta recommends the establishing of:

"Uniform accounting systems on a nation-wide basis with the object of assisting the utilities and regulatory agencies in determining revenue-sharing, cost determination and tariff development on a fair and reasonable basis".

The above point is emphasized in the comments forwarded by the Manitoba Public Utilities Board:

"We will not venture into the constitutional complexities of the jurisdictional field; legal uncertainties abound there, as you well know. If there is no authority for a federal presence in the area, the following caveats are redundant. But if one assumes that a federal regulatory agency is going to take on, either wholly or partially, the responsibility for fixing the rates to be charged for certain telecommunication services, it is obvious that serious problems could immediately confront carriers such as Manitoba Telephone System unless the regulatory policies and directives applied by the federal regulatory agency were fully consistent with those applied by the provincial agency involved. Allocations of cost, classification of accounts, and attribution of revenues are obvious examples of areas in which consistency is almost essential".

Section VI

Concept of a Telecommunications Carrier

Summary

The Concept of a Telecommunications Carrier is that it is an entity, public utility in nature, which performs the function of providing a service to others on demand, for compensation, the predominant purpose of which is the transmission, emission, or reception of signs, signals, writing, images, or sounds or intelligence of any nature by wire, radio, visual, or other electromagnetic systems.

A Telecommunications Carrier has no interest, proprietary or otherwise, in the contents of a message other than of a temporary nature that may arise as auxiliary or truly incidental to the satisfactory conveyance of the message.

Inherent in this concept are certain important telecommunications carrier obligations to the user of telecommunications services, and the concomitant rights of the carrier necessary to perform the services.

The more important obligations to the users are an equitable system of rates, connection of customer-owned equipment, provision of service on demand, liability for any malfunction or misuse, privacy, and the quality of service and continuity.

The rights which are important to the telecommunications carriers are franchise, right of way, access to capital market, right to plan construction, and establish rates.

The interpretation of and the emphasis on the obligations and rights stated above and outlined within this report are basic to the Concept of a Telecommunications Carrier. The character of the interpretation and emphasis is very dependent upon the thinking of policy makers when determining the extent of the regulatory environment within which the telecommunications function is to be performed and the commercial mechanism for its implementation, e.g., monopoly, or competition, or some combination of both.

The federal government officials on the Project Team are well aware of the above implications and have therefore accumulated and presented a range of responsible opinions and reasoning provided by knowledgeable people, regulatory bodies, agencies, and corporations vitally concerned with the future health of telecommunications in Canada who have made known their thoughts and logic in submissions to the Telecommission which are attached to and form part of this study.

OBSERVATIONS

ON

TELECOMMISION STUDY 1(c)

CONCEPT OF A TELECOMMUNICATIONS CARRIER

BY

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

ST. JOHN'S

NEWFOUNDLAND

MARCH 1970.

INTRODUCTION:

These observations are made at the request of the Honourable Eric Kierans, Minister of Communications in a letter dated February 10th, 1970 to the Honourable Joseph R. Smallwood, Premier of Newfoundland, and of Mr. A.E. Gotlieb in a letter dated February 24th, 1970 to the Chairman of the Board. The Board was supplied with a copy of the Terms of Reference for Telecommission Study 1(c) and March 31st, 1970 was stated to be the deadline for receiving submissions.

Study 1(c) - Concept of a Telecommunications Carrier - is one of a large number of telecommission studies initiated by the Minister of Communications for the purpose of gathering information and a representative cross-section for a review of National Telecommunications policy which is now in progress.

Having regard to the wide range of headings covered by the study, the time allowed for a reply, other demands on the Board and staff limitations it has not been possible to deal with the headings in depth but matters of provincial concern which in the opinion of the Board should be considered in forming National policy have been at least identified.

A. DEFINITION OF TELECOMMUNICATIONS:

The technology of communications has been changing so rapidly that any definition based on the equipment used is in danger of becoming inadequate or even inaccurate in a relatively short time. We believe therefore that telecommunications should be defined in terms of the medium used for the transmission of the message rather than in terms of

the equipment used to send or receive it. The following definition is suggested: Telecommunications is the signs or technology of transmitting information, opinions, questions, images or sounds from one place to another by means of electromagnetic waves or impulses.

B. DEFINITION OF TELECOMMUNICATIONS SERVICE:

We suggest the following definition: Telecommunications Service is the use and accommodation afforded present and potential users of telecommunications equipment and includes the plant, equipment and facilities employed in performing such service.

C. DEFINITION OF TELECOMMUNICATIONS CARRIER FUNCTION:

Telecommunications Carrier Function is the action or activity of a person or institution which undertakes to provide telecommunications service for the public or under contract for hire, gain or reward pursuant to the terms of a franchise.

D. DEFINITION OF TELECOMMUNICATIONS CARRIER OBLIGATIONS AND RIGHTS
OBLIGATIONS TO USERS:

(a) Equitable System of Rates:

Pricing is the final step in the rate making process and one of the main reasons for Government regulation of telecommunications carrier is to insure that users will be charged an equitable system of rates. The gross operating revenue required by the carrier is determined primarily by the wages demanded by workmen, the price demanded by suppliers

of plant and equipment and the return demanded by the investors. If these demands are not met service will be withdrawn and the supply of additional materials and capital will be cut off or at least curtailed. Except in the short run therefore carriers are able to influence very little the total amount of money which must be paid by users of their services.

Carriers, however, can and do influence how the total burden is shared amongst the different classes of users. This is done by means of cost of service and market surveys. The first estimates the cost of furnishing service of different descriptions or under different circumstances and the second estimates elasticity in demand. The objective of the carrier is to maximize the gross operating revenue derived from the total capital employed in the undertaking, and given a fixed rate of return this objective minimizes user charges which the carrier can claim to be equitable.

The regulatory body, however, may decide after investigation that some service must be upgraded or that public convenience and necessity require extensions of service that do not promise to be compensatory. In such cases the carrier may be ordered to reduce rates for classes of service deemed to be inadequate or increase rates for certain classes of service to compensate the carrier for extending service to areas which are not self-supporting. The obligations on the carrier to charge equitable rates is therefore two fold. The first is ordinarily imposed as a condition of the franchise which grants the right to serve and the second by regulatory orders which modify the discretion allowed under the first.

The determination of an equitable system of rates is complicated by the fact that telecommunications carriers ordinarily furnish service to users in more than one regulatory jurisdiction. This is particularly true of the telephone carriers. Rates for local exchange and toll calling within the carriers service area are regulated by a provincial authority when the service area is within one province or by a Committee of the Canadian Transport Commission when the service area extends beyond one province. Rates for toll calling beyond the service area are determined by agreement amongst the carriers and these rates are not subject to regulation. The revenue derived from them constitute a substantial portion of each telephone carriers gross operating revenue as this is relatively a fixed amount at any given time. The rates which are subject to regulation must produce sufficient revenue to provide the balance required to meet the total revenue requirements. It follows therefore that regulatory authorities have no power to inquire into whether telephone carriers are observing their obligation to charge equitable rates for toll calling outside their service area and that this in turn restricts the power to investigate the reasonableness of rates charged for services furnished within the jurisdiction of such bodies.

We believe that all rates, tolls and charges for service performed by telecommunications carriers whether for the public or under contract should be submitted to the appropriate regulatory authority for approval and that the burden of proving that rates are equitable should be on the carriers. It is realized that this would create the necessity

to separate the capital investment, the operating revenue and the operating expenses for various classes of service. This is being done now in the United States of America where carriers are regulated by both State and Federal Government agencies. Presumably the Trans Canada Telephone System is using some form of separation procedure for determining inter-system toll calling rates. It is probable therefore that both precedents and statistics are available for the preparation of a Canadian Separations Manual. Regulation of system and inter-system rates could be carried on by Federal and Provincial agencies independently but there are many reasons why their activities should be co-ordinated. The use of a uniform separations procedure is obviously desirable. The pattern of use is likely to vary from area to area but in our opinion the cost and effort involved in developing separate manuals would not justify the greater accuracy likely to be achieved. Equipment used in common to furnish both system and inter-system service could be depreciated at different rates for each but obviously it would be preferable to use a common rate. This would involve a joint finding on depreciation rates for plant and equipment used for common service. Uniform regulation of operating expenses is also desirable for equitable separation into system and inter-system service. This is particularly true of payments to affiliates for services and supplies, calculation of income taxes for rate making purposes and donations for charitable and related purposes. We believe, therefore, that proper enforcement of the carriers' obligations to charge users an equitable system of rates requires greater co-ordination of Federal and Provincial regulatory procedures and activities.

b) Equitable Connection of Customer Owned Equipment and Systems:

Our present stand on this matter is as follows: The company's equipment and wiring shall not be re-arranged, disconnected, removed or otherwise interferred with, nor shall any equipment, apparatus, circuit or device which is not provided by the company be connected with, physically associated with, attached to or used so as to operate in conjunction with the company's equipment or wiring in any way, whether physically, by induction or otherwise, except where specified in the company's tariff or by special agreement: Provided that this regulation shall not apply to any equipment, apparatus, circuit or device provided by a customer which is used or connected with the company's equipment or wiring in a manner acceptable to the company and in the company's opinion is unlikely to impair the functioning of its service and equipment or create a hazard for users thereof or its employees. In the event of a breach of this regulation, the company may rectify any prohibited arrangement or suspend and/or terminate the service.

(c) Provision of Service on Demand:

Acceptance of a franchise obligates a carrier to furnish reasonable adequate service. This obligation, however, is dependent on the need for the service and the demand of a very few is not required to be satisfied if this casts an undue burden on the other users because in the final analysis it is they and not the investors who share the costs of meeting all demands. The carrier is obligated to anticipate the natural growth in demand from the public it has undertaken to serve as a whole and take reasonable measures to provide plant and equipment to meet this demand. When special costs must be incurred to serve a few users the carrier is entitled to demand a contribution in aid of construction before service is supplied. If a reasonable contribution is offered in special circumstances the carrier should be obligated to furnish the service.

(d) Liability for Telecommunications Malfunction or Misuse

Liability of the carrier for telecommunications malfunction should depend on whether the malfunction is due to negligence on the part of the carrier or his employees, to acts of third parties, to acts of God or to misuse by users. In the first case the carrier should be liable for damages suffered by users but the degree of liability should be clearly stated in the service contract and amounts paid in compensation should be charged to retained earnings and not to expenses. If the liability or amount of compensation cannot be settled by agreement between the carrier and the users or third parties the matter should be referred to a court of competent jurisdiction. In the other cases the liability of the carrier should be limited to restoring proper service within a reasonable time to all except to the user responsible for misuse.

If the misuse was accidental the user is entitled to have proper service restored but when telecommunications services are used for illegal purposes or to annoy other users the carrier is justified in seeking approval to terminate service but it is not the function of the carrier to decide that the law has been broken.

(e) Legal Right of User to Privacy:

Our Board has never been called upon to consider whether the user already has the right to privacy under existing law or should be granted the right in new legislation. It is noted that the matter is the subject of a separate Telecommission Study and therefore we do not wish to submit observations on it.

(f) Quality of Service and Continuity:

Fair and just rates have no meaning except in the context of reasonably adequate service. Enforcement of the obligation to furnish reasonable safe and adequate service is the other main purpose for regulation. But reasonable service does not mean perfect service free of problems or the standard demanded by a particular user. Likewise no one matter singled out is sufficient to show that the service rendered is inadequate. Reasonable adequate service is what is practicable having regard to the cost, the volume of traffic and the capacity to serve public necessity.

Public necessity requires that the service be continuous. The carriers should not abandon any part of its service after the same has been in operation without consent in writing of the regulatory authority

which consent should only be given after notice to all interested users and after public hearing.

The carriers' obligation to continue service is qualified of course by circumstances beyond its control such as acts of God and strikes.

2. RIGHTS:

(a) Franchise:

The obligation of the Telecommunications Carrier to users are predicated upon the granting of a limited monopoly by the appropriate government authority. This grant is normally referred to as a franchise, and is necessary because Telecommunications services are deemed to be required for the public convenience and necessity and that if they were granted by competitive private enterprises the costs of the services would be higher than if they were provided under a regulated monopoly. The reason for this is the greater investment in plant and equipment in relation to annual gross operating revenue than other industries. Capital intensive regulated monopolies normally fall within the public utility classification and this is why Telecommunications carriers should be subject to public utility law in the jurisdiction in which they provide service.

Other reasons for the granting of a franchise is to secure to the carrier the rights subject to control of constructing overhead and underground lines along public streets and to transmit electromagnetic signals through space.

(b) Right of Way:

As stated above a right along public streets is ordinarily granted in the franchise. Rights of way across Crown Lands are normally granted upon application to the appropriate provincial authority in the manner prescribed by provincial legislation. Carriers should be granted the right to expropriate rights of way over privately owned land either in their franchises or in provincial legislation relating to public utilities. These rights however should be subject to regulation by the appropriate regulatory authority. Ordinarily carriers should be required to notify the owner of the property that a right of way is desired and that it is proposed to carry out a survey. If agreement cannot be reached with the owner the carrier should petition the regulatory authority for approval to expropriate and to fix the amount to be paid for compensation. This would be followed by public notice and a hearing. After considering alternative routes available, the needs of the owner and public necessity the regulatory authority would make an order on the application. Such orders should be subject to appeal to a court of competent jurisdiction upon questions of law or fact. In addition to the general right of expropriation of property for operation of a Telecommunications Service the carrier should have a summary right to apply for approval to expropriate rights of way for overhead and underground conductors. If the regulatory authority is satisfied that summary approval is required an order should be made

and title should pass 10 days after notice is given that the right of way is required. If agreement cannot be reached on the amount of compensation to be paid evidence should be heard after due notice by the regulatory authority and compensation awarded. An appeal should be allowed on the amount of compensation but not in the expropriation. A typical instance in which the summary procedure would be used is where lines must be relocated because of public works and the alternative to crossing adjacent private property is a circuitous route which would involve unreasonable costs or delays. A carrier should not be required to compensate a user for a right of way obtained only to serve him.

(c) Right of Access to Capital Market:

Telecommunications carriers must have right of access to capital markets in order to obtain the money required for the construction of their fixed assets. This right, however, like the other rights granted to carriers should be subject to regulatory control. It is true that this type of regulation is often regarded by management as an encroachment on their discretion but nevertheless regulatory jurisdiction over the issuing of public utility securities is common practice and should be continued. Some of the provinces exercise control over the issuing of securities in general legislation. The primary purpose is to protect the investors. Primarily the role of

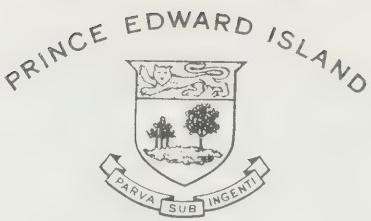
regulatory authorities is to protect the users and in order to do this control over the issuing of securities is just as essential as control over the user charges. If it can be assumed that management will always bear the public interest in mind when deciding the amounts and the nature and the relative ratios of securities it can also be assumed that they would consider the public interest in designing rate schedules. Experience has shown that regulation of the one is as necessary as the other. Where control is exercised by both Federal and Provincial authorities there is an obvious need of close liaison between the two. The Newfoundland Public Utilities Act gives the right to the regulatory authority not only to regulate security issues but also dividend payment policy in certain circumstances.

(d) Right to Plan Construction:

Telecommunications Carriers have more than the right to plan construction. They have the obligation to do so. This arises out of the obligation to provide reasonable adequate service. Telecommunications Carriers are required to stand ready to serve whatever reasonable demands users may place upon them. They must, therefore, plan to meet future demands so that facilities will be ready when needed. This requires construction of reserve capacity to provide for growth and breakdown while new plant is being constructed.

(e) Right to Establish Rates:

A telecommunications Carrier should not have the right to establish rates. This follows from the opinion expressed in heading D- 1(a). The carrier does have the right and obligation to submit a tariff of equitable rates for approval but the rates should be established by order of the regulatory authority and not by the carrier.



ADDRESS ALL COMMUNICATIONS TO
THE COMMISSION

PUBLIC UTILITIES COMMISSION

CHARLOTTETOWN, P. E. I.

1 April 1970

FILE T-1

Mr. A. E. Gotlieb
Deputy Minister of Communications
Ottawa 4, Ontario

National Telecommunications Policy

Dear Mr. Gotlieb:-

Receipt is hereby acknowledged of your letter of 24 February 1970, together with a copy of a letter to the Hon. J. Elmer Blanchard, Attorney-General, under date of 10 February 1970.

With specific reference to the items referred to in the Terms of Reference of Study I(c), the following is submitted.

Relative to the definitions set forth under items A., B. and C., it is the opinion of this Commission that these could only be defined by a study group or committee satisfactory to all jurisdictions in which they are to be used. This committee should consist only of members well qualified in the various branches of telecommunication, particularly if anything other than very loose definitions are to be evolved.

D. (1) Obligations to Users

(a) Equitable rates should be determined using generally accepted Public Utility practices, computed by using the earnings base as fixed and determined by a competent control authority for each type of service furnished, rendered or supplied, using the prudent original investment less accrued depreciation method. Such return should be in addition to all reasonable and prudent expenses properly chargeable to operating account, as well as such other allowances which may be approved by the control authority.

r. A. E. Gotlieb

1 April 1970

(b) Only such equipment owned by the telecommunications system or by a customer as has complied with a suitable mechanical and electrical manufacturing standard and which is compatible to the existing system should be connected.

(c) Such telecommunications system should be required to provide service where available to all customers meeting the necessary qualifications and who are financially responsible. In addition to this, service should be provided to customers where the charge for service will be compensatory to the system within a reasonable length of time and where a contract for a minimum period of service has been negotiated. In addition to this, service should be provided by such telecommunication system to any customer who is prepared to contribute toward all reasonable costs, particularly with regard to equipment that would not be used or useful if such customer discontinued the service.

(d) Liability for malfunction or interruption of service is a factor which has to be taken into consideration in all classes of utility operation. It is not reasonably conceivable that a responsible utility would deliberately interrupt service or bring about a malfunction of equipment. If the services were not reliable, customers would not use the utility. If heavy compensation were ordered, it would simply mean that the cost of service to all customers would have to be increased in order to pay compensation to one customer. Liability should be limited to a reduction in the charge for services equal more or less to the duration of the interruption. However, no utility could reasonably be allowed to contract itself out of legal responsibility for malfunction or interruption of service for which it is responsible either by negligence or by deliberate misuse of equipment or facilities. Any claim for liability would normally have to be settled in the courts where legal precedents covering all types of claims have been well established. Misuse is another matter altogether and certainly the utility as such, being an inanimate entity, could not misuse its own equipment. Any individual responsible for the misuse of the equipment, employee or otherwise, should be dealt with in the courts where the degree of responsibility between the utility and the individual responsible could be determined.

(e) The legal right of an individual user to privacy should be of prime concern to any communication carrier. However, if there are substantial grounds to believe that the equipment is being used for illegal purposes or to defraud, then an order should be obtained for the purpose

Mr. A. E. Gotlieb

1 April 1970

of monitoring the line. The police should at least have access to the same facilities for apprehending wrongdoers as the wrongdoers have of trying to evade the law.

(f) The quality and continuity of service should be of the highest order that it is economically feasible to provide. This of course is not to say that the quality of service should be in excess of a reasonable standard required by each classification of customer. Every consideration, however, would have to be given to providing a higher class of service to those customers requiring it, but charges for the service should be based accordingly.

(2) Rights

(a) In a business which is as involved and expensive to establish as is communications, it hardly seems reasonable to allow a utility to build up and provide the means whereby service can be supplied to the public and then to take the privilege away because of a franchise. Franchise or no franchise, the matter would have to be heard in the courts. A section in a federal act of incorporation would seem to fill the requirement of any such telecommunications system.

(b) There are abundant precedents relative to "rights-of-way". If they come to dispute them, such matters would have to be settled in the court in any case.

(c) Such organizations should have the same access to capital markets as any other federal incorporation or utility.

(d) The right to plan construction would simply be provided for in a section of the act of incorporation.

(e) No organization which is providing a service should be allowed to set its own rates on the inter-provincial basis. These rates could be set by the Canadian Transport Commission, and on the provincial basis by the various Public Utilities Commissions.

We trust that these observations may be of some assistance to you.

Yours very truly,

A. W. Matheson
Chairman



PROVINCIAL SECRETARY
NOVA SCOTIA

Halifax, March 19, 1970

Honorable Eric Kierans,
Minister of Communications,
Ottawa 4, Ontario.

Dear Mr. Kierans:

Since receiving your letter of February 10 concerning the review of a national Telecommunications policy I have had discussions with our Board of Commissioners of Public Utilities, which as you know regulates Telephone Companies in relation to voice transmission. The Board has not exercised any control over the use of company equipment for other types of communication and consequently has not been under the necessity of familiarizing itself to any great extent with these other types of service.

The Government of the Province is naturally very much interested in any proposals for additional or different types of control and regulation of this industry and appreciates being informed about the studies that are being carried on by Telecommission. We do not feel, however, that we have sufficient knowledge of the many possible types of Telecommunications or of the nature and extent of the control of them that you may be considering to make any useful comments or submissions at this stage.

MH

I note that the first point to be considered by Telecommission under study I(c) is the formulation of a definition of Telecommunications. This seems to me to be a fundamental matter to be considered and certainly until that point is reached the Province would hesitate to comment on the substance or principles of control and regulation.

For the present, therefore, the Province does not propose to make submissions. We would appreciate, however, receiving the results of the several studies that are under way and would welcome a discussion with representatives of your Government or participants in the various studies.

Your Deputy Minister Mr. Gotlieb has been in touch with the Chairman of our Board. The Board is of course quite prepared to discuss the matter with him and with Mr. Bergeron on their proposed visit to Halifax.

Yours very truly,

A handwritten signature in cursive ink that reads "E. D. Haliburton".

E. D. Haliburton
Provincial Secretary



DEPARTMENT OF TRANSPORT
TRANSPORTATION DIVISION

FERGUSON BLOCK, QUEEN'S PARK
TORONTO 5

April 3, 1970.

Mr. H. Hindley,
Department of Communications,
Secretary to Telecommission,
100 Metcalfe Street,
Ottawa, Ontario.

Dear Mr. Hindley:

With reference to your letter dated March 19, 1970, pertaining to Telecommission Study 1(c), I am enclosing a copy of a letter received from the Ontario Telephone Service Commission. Ontario Northland will be responding to this item as well, and I expect to be in a position to forward their response to you shortly.

Our Telecommunications Committee has not yet had an opportunity to consider this topic. However, judging the direction in which the various deliberations have been proceeding, I might offer a few general personal comments as follows:-

- 1) The Legal Panel tends to favour a restrictive meaning of "Telecommunications", to include no more than "radio", "telephones", and "telegraphs", as these terms have been defined by the Courts or the B.N.A. Act.
- 2) There is a definition of "common carriers" at common law, which strikes us as being worthy of consideration. (A copy of the memo prepared for our Legal Panel by the Department of Justice is enclosed.)

Mr. H. Hindley,
Secretary to Telecommission,
tawa, Ontario.

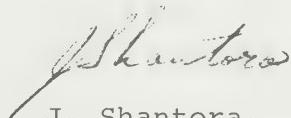
April 3, 1970.

-2-

- 3) The Bell Telephone Company occupies a unique position which gives it a competitive advantage over the 66 independent provincial telephone companies in Ontario. This advantage might also be categorized as an inadvertent provincial subsidy to the Bell Telephone Company.

To briefly explain item 3, the Department of Highways pays up to 50% of the labour costs incurd in relocating telephone lines, (or lines of public utilities) when such relocation is required for road widening. The Bell Telephone Company does not consider itself bound by provincial legislation, and therefore demands full compensation for all relocation costs. A copy of "The Allocation of Costs of Relocating Facilities Owned by the Bell Canada Located on Highway Rights-of-way" prepared by the Legal Panel of our committee describes this problem in more detail.

Yours truly,



J. Shantora,
Chairman,
Telecommunications Committee.

The Allocation of Costs of Relocating Facilities

Owned by the Bell Canada Located on

Highway Rights-of-Way

It appears to be undisputed that Section 3 of the Bell Telephone Company Act confers upon that company the right to use public highways for the construction of its telephone lines and equipment. Granting this right to the Bell Telephone Company, the section however does not establish any terms and conditions upon which this right may be exercised, save and except the consent of the municipality having jurisdiction.

When it becomes necessary to relocate a public highway on which telephone lines are run, it of course becomes necessary to relocate these Bell Telephone Company lines. At the present time the Bell Telephone Company takes the position that the entire cost of relocating its lines and equipment shall be borne by the Province and such costs are becoming very substantial, often running in the neighbourhood of several millions of dollars per annum.

It is recommended that, conceding the right of the Bell Telephone Company to run its lines on provincial highways, they do so subject to provincial laws of general application. Consequently, the Bell Telephone Company should be subject to the Public Service Works on Highway Act, a provincial statute insofar as the apportionment of the cost of relocation is concerned. In essence, the statute provides that only the labour costs will be recognized, and that up to 50% of such costs will

be paid by the Province. The Ontario incorporated companies comply with these provisions.

It is further recommended that the Bell Telephone Company be put in a position which would be no different than it would be in, if it had been required to negotiate easements for its transmission lines over private property. Consequently, a mileage charge is considered to be in line with this recommendation.

A review of the cases concerned with this matter seem to indicate that since inter-provincial telephone and telegraph lies within the Federal jurisdiction constitutionally, that this jurisdiction cannot be divided to permit the municipality or the province, together with the Federal government, to exercise control over the Bell Telephone Company.

The inability to exercise some degree of provincial control creates an inequitable financial situation for the province in that it is called upon to bear the entire cost of relocating Bell Telephone Company lines when it becomes necessary to move a public highway in any respect, notwithstanding application of sound planning principles. The judicial authority seems to rule out any appeals to the courts in this regard, and it is therefore recommended that a position be taken with the Federal government for either a constitutional amendment which would enable the province to impose conditions upon which the Bell Telephone Company be permitted to run its lines on provincial highways, or alternatively, the Bell Telephone Company Act should be amended

to make it clear that Bell Telephone Company is subject to the laws of the Province of Ontario having general application. This recommendation assumes the fact that Bell has the right to use the public highways for its transmission lines.

The ideal position from the point of view of the Province of Ontario would be to reduce the power of the Bell Telephone Company in this matter to that of a statutory licensee of occupation only. A license does not amount to an estate or other interest in land; it must be construed as a right to occupy the highway in accordance with the conditions obtaining thereon from time to time. This being the provincial position applied to other utilities, the Bell Telephone Company right is a statutory right which should be regarded as a special statutory privilege upon property vested in the municipality or in the province, and paid for and maintained by the inhabitants of the municipality or the province.

To permit the existing situation to exist, results in a position where a substantial financial disadvantage is constantly accruing to the province, amounting to some millions of dollars per annum. To permit a private company to make a substantial annual profit at the expense of the tax-payer is, in the opinion of this committee, a highly inequitable position which should not be permitted to continue.

Mr. A. A. Hermant,
Chairman,
Legal Panel
(Telecommunications Committee.)



ONTARIO

OFFICE OF THE SENIOR CROWN COUNSEL

MEMORANDUM

TO Mr. J. Shantora,
Chairman, Telecommunications
Committee

FROM Robin Scott, Counsel

DATE April 1st, 1970

Re: 1(c) of the Terms of Reference
to the Telecommission entitled
"Concept of a Telecommunications Carrier"

I received your memorandum dated March 25th on March 31st
and have attached such comment as the urgency of the matter would
allow.

A handwritten signature in black ink that reads "Robin Scott".

Robin Scott.

RAS:ph
encl.



DEPARTMENT OF THE ATTORNEY-GENERAL
MEMORANDUM

Date

From

Subject:

Common Carriage.

1. After a fruitless search for authorities re common carriage as applied to telecommunications I called Mr. A. A. Hermant (Local 4264), Legal Branch, Ontario Housing Corporation. He informed me that he merely was interested in the traditional definition of common carriage as the Federal Government appeared to be applying the term to telecommunications. Herewith the traditional meaning:-

2. "To constitute a person a "Common Carrier" he must be ready to carry for hire as a business and not as a casual occupation. It is essential that he should hold himself out as being ready to carry goods for any person or to carry any passengers no matter who they may be. If he carries for particular persons or certain passengers only he is not a common carrier, and the relationship between him and the owner of the goods or the passenger in one of special contract [and so would be termed a private carrier] If he retains a right of selection as to whom or what he shall carry he is not a common carrier"

"A carrier may profess to carry only particular kinds of goods, in which case he is a common carrier only of such goods; or he may profess to carry only from one place to one other place in which case he is not a common carrier to intermediate places or to any other place"

Halsbury, 3rd Edition, Vol. 4, pg. 131

The significance of distinguishing between common and private carriers is their differing duties and liabilities at common law. A private carrier is considered a bailee and the general law of bailment applies, and so before a private carrier can be liable for loss of goods negligence must be proved. A common carrier is responsible for the safety of

- 2 -

the goods entrusted to him in all events, except loss arising solely from an Act of God or the Queen's enemies. In short he is an insurer.

3. Note that the above sets out the position at common law. Actual liability of any carrier to-day must take into consideration the statutory provisions regarding transporters of goods.

4. A perusal of the following leads to a similar conclusion as found in Halsbury.

1. Canadian Abridgment, 2nd Edition Vol.5 p.208.
2. Butterworths Ontario Digest, Vol.2, p. 260.
3. Report of the Contracts and Commercial Law Reform Committee of New Zealand at p.3

[Attached]



ONTARIO

DEPARTMENT OF AGRICULTURE AND FOOD



MEMORANDUM

March 24, 1970

To Mr. James Shantora, Solicitor
 Department of Transport,
 Ferguson Block, Queen's Park

FROM R. V. L. Handforth, Engineer
 Ontario Telephone Service Comm.

RE: Telecommission Study I (c): Concept of a
Telecommunications Carrier

The proposed definitions, attached, were presented to this Commission at its regular meeting, March 19, 1970, and were accepted.

I was directed to forward them to your committee for further consideration.

R. V. L. Handforth

R. V. L. Handforth, P.Eng.

Attn:

/ps

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DEPARTMENT OF AGRICULTURE AND FOOD
ONTARIO TELEPHONE SERVICE COMMISSION

TERMS OF REFERENCE
TELECOMMISSION STUDY I (c)
CONCEPT OF A TELECOMMUNICATIONS CARRIER

A. Definition of Telecommunications:

By means of energy, to convey intelligence over distances beyond the range of the unaided senses.

B. Definition of Telecommunications Service:

The provision of telecommunications, adequate to a need, in return for a fee.

C. Definition of Telecommunications carrier function:

A telecommunications carrier shall function to provide telecommunications of one or more types without discrimination as to user and in full respect of all users' privacy.

D. Definition of Telecommunications carrier obligations and rights:

D.(1) Obligations to Users:

D.(1) (a). Equitable System of Rates:

- (i) Rates should be as low as practically possible.
- (ii) Within the limits of practicability, a rate system should safeguard against discrimination among sectors of the public economy.
- (iii) Rates charged for the component parts of a telecommunication link should be fairly apportioned, so that revenue accruing from one part is not used to subsidize another, without respect to whether one or more ownerships are concerned.
- (iv) Rates charged for one telecommunications service should not provide excess revenue for the subsidization of another service, it being understood that the expenses of research and development may fittingly be imposed as a proper charge upon the carrier's overall revenue from all services being provided.

D. (1)(b) Equitable connection of customer owned equipment and systems:

- (i) The Telecommunications carrier should explicitly and publicly state the requirements for compatibility of equipment or systems which may be connected. These requirements should not be illusory, but necessary only by reason of the method of operation of the carrier's service, to which service a detriment would result if they were not met.
- (ii) The carrier should provide, at fair rate, an interface permitting adequate connection between and separation from its and the private equipment or system.

D. (1)(c) Provision of service on demand:

Withⁱⁿ a territory in which it is franchised, a carrier should provide, upon genuine demand, the telecommunication service for which it holds the franchise, subject to the following provisos:

- (i) The demand may be refused if its satisfaction would incur a credit risk beyond that normally acceptable in the territory and at the time concerned.
- (ii) The carrier should be permitted a normal implementation time for installation of service.
- (iii) If provision of the service engenders costs beyond those normal to the context of the rate system under which the carrier is regulated, then the carrier may require compensation for such costs in advance of its making expenditures to install the service.

D.(1)(d). Liability for telecommunication malfunction or misuse:

With the principle accepted that carriers be franchised and regulated, the possibility of competition functioning to promote excellence of service is vastly diminished.

The fact also exists that provision of safeguards against malfunction or misuse introduces capital and operation costs in non-linear increasing scale as the degree of service excellence to be achieved is enhanced.

An economic balance must therefore be struck between the results desired and the cost. Once determined, this will operate as a significant factor in developing the rate system applying to the service.

By its approval of the rate system for the service, the carrier's regulatory body will imply acceptance of the degree of malfunction or misuse which might occur.

It follows logically that a carrier should be liable for malfunction or misuse only when such degrades its service below the standard for which it is rated.

D.(1)(e) Legal right or user to privacy:

A telecommunications carrier should guard absolutely the privacy of users of its service, unless required to do otherwise by the law.

D.(1)(f) Quality of service and continuity:

This would appear to be the positive converse of D(1)(d), and the same principle applies.

D.(2) Rights

D.(2)(a) Franchise:

. Provision of franchise to a carrier shall mean that the carrier will not be subjected to competition against the service which it is franchised to provide. This franchise shall be inviolate so long as the carrier adequately meets user demand for its service, and so long as its standard of service meets the degree of excellence demanded by its approved rate system. Consistent failure of the carrier to fulfil these requirements could result in its loss of franchise.

A public situation may develop, through time or technology, resulting in a carrier's franchised offering going against the trend of telecommunications requirement within its franchise. Since the public welfare must control, the carrier's regulatory body may require termination of the carrier's franchise under such conditions. It shall be the responsibility of the regulatory body to ensure that the carrier obtains fair compensation in its relinquishment.

D.(2)(b) Right of way:

The granting of a franchise to a carrier implies that the manner of the carrier's operation is understood. Granting a franchise would therefore seem pointless if it did not provide for location of the carrier's plant.

Costs of obtaining rights of way reflect directly into rates necessary to provide a telecommunications service. Approval of rate systems would appear pointless if right of way costs were not expected to follow a logical pattern.

It follows that access to adequate right of way is not only fundamental to a carrier's operation but also inextricably involved in its regulation.

Provisions for telecommunications carrier's use of right of way, either solely or by sharing with other utilities, should therefore be established through legislation running parallel to that establishing its regulation.

D.(2)(c) Right of Access to capital market:

If the principle is accepted that a carrier's maintenance of its franchise implies that it provides service upon demand, then it should be permitted competitive access to the current capital market. To be logical, regulation of its rate system should be permissive in this regard.

D.(2)(d) Right to plan construction:

It is believed axiomatic that establishment, extension and operation of any utility may proceed economically only if adequate planning prevails.

It is therefore encumbent upon the carrier's regulatory body to ensure that franchise allocation and rate regulation are such that the carrier may proceed confidently with normal construction planning on basis of at least 5-year target sequence, if service economy is to be expected.

D.(2)(e) Right to establish rates:

Like any other person or organization publicly offering a service for hire, the telecommunications carrier should possess the right to establish a charge for its service.

The fundamental difference between a freely competitive organization and the carrier is simply that of control of the charge. Competition operates to control the former's charge; regulation should operate to control the latter's.

TELECOMMISSIONSTUDY 1 (c)

LEGAL CONSIDERATIONS

Terms of Reference - APPROVED

1 (c) Concept of a telecommunications carrier.

Employing the following headings, we shall postulate what a telecommunications carrier should be:-

- A. Definition of Telecommunications
- B. Definition of Telecommunications Service
- C. Definition of Telecommunications carrier function
- D. Definition of Telecommunications carrier obligations and rights.

(1) Obligations to Users

- a) Equitable System of Rates.
- * b) Equitable connection of customer owned equipment and systems.
- c) Provision of service on demand.
- d) Liability for telecommunication malfunction or misuse.
- * e) Legal right of user to privacy.
- f) Quality of service and continuity.

(2) Rights

- a) Franchise.
- b) Right of way.
- c) Right of access to capital market.
- d) Right to plan construction.
- e) Right to establish rates.

* These elements are the specific subject of other Telecommission Studies.

TERMS OF REFERENCE, TELECOMMISION STUDY
1(c), CONCEPT OF A TELECOMMUNICATIONS CARRIER

Add to paragraph D(1)(a) the following sub-paragraph:

(v) An equitable system of rates should produce an overall fair rate of return, the level of which should be sufficient to enable the carrier to continue to provide the service and to expand without capital impairment, to cover the cost of providing the service and to produce no higher than a fair return to persons investing in the carrier;

Subsumed within the foregoing is the theory that an equitable system of rates should produce an overall fair rate of return that is sufficiently high to enable the carrier to attract debt or equity capital at a reasonable cost.

I would add to paragraph D(1)(d) entitled "Liability for telecommunication malfunction or misuse" the following: Although there is an overriding necessity to strike an economic balance between the results desired and the cost that is, between the quality of service and the cost of providing it having regard to the non-linear increase in costs, it is difficult to apply the theory that the approval of the rate system for the service by the carrier's regulatory body will imply acceptance of the degree of malfunction or misuse which might occur. The approval of the rate system may also imply acceptance of the necessity to attract capital and hence the necessity for a particular rate of expansion. Aside from this however, it is extremely difficult to correlate the implied acceptance entailed by regulatory approval with the quality of service or the permissible degree of malfunction or misuse. It would appear that in attempting to gain high rates a carrier will stress "immediacy or presence" conveyed by the quality of the communication to a greater degree than is required to provide the service. In the final analysis the correlation between the quality of service and the degree of malfunction on the one hand and the level of rates on the other hand is incapable of precise definition or measurement and remains a matter of judgment on the part of the regulatory body.

It is easy to state but difficult to apply the theory that a carrier should be liable for malfunction or misuse only when such degrades its service below the standard for which it is rated. In the United States there are instances where regulatory commissions have, because of the low quality of service, refused rate increases. Assuming a proper degree of managerial efficiency, this can only be justified as a disciplinary or similar action. And given this, such action would seem to be self-defeating.

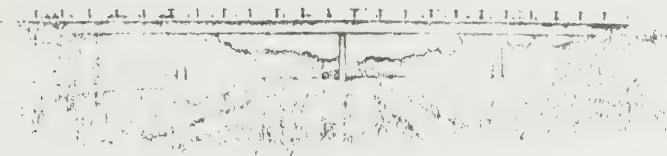
In addition, it would appear that there should be some causes beyond the carrier's control on the occurrence of which the carrier would be excused from liability for a service interruption.

Paragraph D(2)(c) entitled "Right of access to capital market" should be considered along with D(2)(d) entitled "Right to plan construction". These are inextricably interwoven. The demand for capital is conditioned by the carrier's construction, expansion or maintenance requirements. The question therefore arises whether the right to plan construction should be reserved as an exclusive managerial prerogative of the carrier or be subject to regulatory scrutiny or approval. Control over expenditures can be exercised by regulating the amount of new debt or equity capital the carrier may issue i.e. regulating the right hand side of the balance sheet or on the other hand regulating the need for capital by prescribing approval for capital projects themselves (the left hand side) without approval for capital projects where new equity issues or new borrowings are reserved strictly to managerial judgment of the utility, the carrier may incur a new debt which requires higher rate in order to be serviced and this is done as a fait accompli. Vesting a regulatory body with jurisdiction to pass on the necessity of capital expansion and requirements inevitably involves the fact of regulation constituting an interference with the judgment of management. This interference should be accepted, the degree of interference of regulatory scrutiny being made dependent on the circumstances. Except in the case of large once-and-for-all capital additions or capital expansions to a carrier's system, it is difficult to create a mechanism or method for regulatory approval both as to the timing, the amount or the need for capital expenditures. Unlike other utilities ordinarily the expansion of a telecommunication carrier consists of many small capital additions which aggregate a large amount, and an ad hoc line has to be drawn between involving the regulatory commission in assessing the necessity for every dollar of expenditure as opposed to no regulatory interference with spending whatsoever.

With respect to paragraph D(2)(e) entitled "Right to establish rates the following paragraph should be added:

The right of a carrier to establish a charge for its service should be subject to regulatory approval. This follows because regulation is a substitute for competition. The degree or closeness with which the regulatory jurisdiction is exercised should recognize the necessity of interfering with management decisions only to the extent required by the public interest.

It follows however that if regulatory scrutiny will on occasion involve interference with management then the expertise possessed by the regulatory body and its staff must approximate the expertise enjoyed by the carrier and its staff otherwise the interference with the decisions of management may be technically incorrect and more than required to reconcile the demands of the public interest with the interests of the investors in the carrier or its creditors.



DEPARTMENT OF HIGHWAYS

Downsview 464, Ontario.
10th February, 1970.

MEMORANDUM TO:

Mr. A. A. Hermant,
Corporate Secretary and Chief Counsel,
Ontario Housing Corporation,
188 University Avenue,
Toronto 1, Ontario.

Re: Department of Highways involvement
in Telecommunications.

The major concern of the Department of Highways in respect of telecommunications arises out of the common practice of the telecommunication industry of using highway rights-of-way for the installation of land lines. The Department of Highways has under its jurisdiction and control approximately 13,000 miles of provincial highway right-of-way which, because of its very nature, provides a ready and obvious route for land lines between major centres.

The installation of any obstruction on the highway right-of-way, including pole lines and buried cables, increases the cost of maintaining and reconstructing roads. To the extent that a roadway has to be excavated or used as a site for maintenance and repair crews of telecommunication companies, the Department must be concerned about the additional hazard to the travelling public that is created.

As part of its responsibility for highways, the Department administers The Public Service Works on Highways Act, an Act which provides a statutory formula for the sharing of costs incurred when certain utility lines must be relocated during the course of the reconstruction of a highway. The Act applies, *inter alia*, to telephone companies that are under the jurisdiction of the provincial government. It does not, however, apply to Bell Canada as this company has been brought under federal jurisdiction.

Mr. A. A. Herinrant,
 Corporate Secretary and Chief Counsel,
 Ontario Housing Corporation,
 Toronto.

10th February, 1970.

Re: Department of Highways involvement in Telecommunications,

In addition to the Department's concern for provincial highways, it is also concerned about the impact telecommunication land lines have on municipal highways since the cost of such highways are subsidized at least 50% by the Department.

The Department of Highways, in conjunction with the Department of Justice, is currently preparing a case involving Bell Canada and a number of utility relocation moves involving in excess of a million dollars in costs. It is intended that this case will result in some judicial interpretation of the constitutional basis upon which Bell Canada operates on Ontario highways. Of key significance will be the constitutional issue concerning the power of the federal government to grant to the Bell Canada a property interest in provincial Crown lands without the payment of compensation. In this regard, I should point out that Bell Canada claims the right to come upon provincial and municipal highway rights-of-way free of charge by reason of enabling federal legislation.

Bell Canada derives whatever powers it has from its own federal act of incorporation and from the Railway Act. The latter Act has been administered by the Board of Transport Commissioners in the past and, more recently, by the Railway Transport Committee of the Canadian Transport Commission. Historically, this Commission has refused to deal with the question of the charges, if any, that should be assessed against the Bell for the privilege of coming upon highway rights-of-way. It has, however, seen fit to establish a new formula for cost sharing which was applied in a case involving Metropolitan Toronto and Bell Canada. The cost sharing established by this case is not acceptable to the Province and we are, therefore, pursuing the action mentioned above.

It is my understanding that Bell Canada operates in Ontario, Quebec and Newfoundland and that it also has an interest in one of the telephone companies serving one of the Maritime provinces. I also understand that the British Columbia Telephone Company has a federal charter and perhaps comes under federal jurisdiction. Apart from these provinces, it is my understanding that the telephone companies are either owned or controlled provincially. In these provinces, it is possible for the provincial government to establish a uniform policy with respect to the installation of land lines on highway rights-of-way.

Mr. A. A. Hermant,
Corporate Secretary and Chief Counsel,
Ontario Housing Corporation,
Toronto.

10th February, 1970.

Re: Department of Highways involvement in Telecommunications.

I would suggest that any review of the legal problems relating to telecommunications should draw attention to this unequal jurisdictional control over telephone companies operating in various provinces and, further, I would suggest that assuming the conclusion is reached that the federal government has properly assumed jurisdiction over Bell Canada within Ontario, strong representation should be made that the basis of regulation of that company in Ontario should not place the Province of Ontario in a less favourable position than would exist if the Province were able to control Bell Canada within Ontario. In this regard, the history of regulation and current regulatory setting will demonstrate that Ontario is presently in a less favourable position than those provinces which have control of their own telephone systems.

A further aspect of land lines as they affect highway rights-of-way arises out of the current use of coaxial cables for the transmission of T.V. programs, telephone calls, computer data, etc. Where such lines are erected by a provincial company, they can be controlled by the provincial government. However, where the user elects to rent

DAC/fb


D. A. Crosbie,
Director, Legal Branch.



THE PUBLIC UTILITIES BOARD
Office of the Chairman

March 23, 1970.

A. E. Gotlieb, Esq.,
Deputy Minister of Communications,
Ottawa 4, Ontario.

Dear Mr. Gotlieb:

I acknowledge receipt of your letter of February 24th.

Regarding Study 1(c), entitled "Concept of a Telecommunications Carrier", our Board's comments will be brief. There are two sub-clauses which could directly affect the discharge of our responsibilities, namely, the items "Equitable System of Rates" and "Right to Establish Rates".

We will not venture into the constitutional complexities of the jurisdictional field; legal uncertainties abound there, as you well know. If there is no authority for a federal presence in the area, the following caveats are redundant. But if one assumes that a federal regulatory agency is going to take on, either wholly or partially, the responsibility for fixing the rates to be charged for certain telecommunication services, it is obvious that serious problems could immediately confront carriers such as Manitoba Telephone System unless the regulatory policies and directives applied by the federal regulatory agency were fully consistent with those applied by the provincial agency involved. Allocations of cost, classification of accounts, and attribution of revenues are obvious examples of areas in which consistency is almost essential.

Achieving and maintaining consistency in regulatory policies and directives would seem to entail, as a minimum, a continuing close liaison between the regulatory agencies involved. The possible consequences of an alternative policy have been visible for years in the form of the abrasive relationship existing between the F.C.C. and the state regulatory agencies

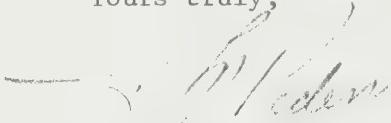
- 2 -

in America. The burdens which F.C.C. rulings can throw back upon intra-state service are common knowledge. One is driven to the conclusion that the public interest there could be better served through more active co-operation between the agencies involved.

The American experience may nevertheless serve as a useful negative guide here.

I trust the foregoing will be of some assistance.

Yours truly,



D.M. Peden, Q.C.,
Chairman.

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March 26, 1970

Mr. A.E. Gotlieb,
Deputy Minister of Communications,
Ottawa 4, Ontario

Dear Mr. Gotlieb:

This is in reply to your letter of February 24th concerning the views of the provincial government or its regulatory body on Telecommission Study I (c) "Concept of a Telecommunications Carrier" as described in the letter from your minister, The Honorable Mr. Kierans, to the Premier of Saskatchewan.

You have no doubt been advised of our Premier's reply of February 25th, when he advised your Minister that I have been authorized to act as the liaison representative to present the views and observations on behalf of the government on telecommunication subjects.

As you are aware we are somewhat unique in Saskatchewan in that no formal body has been established to regulate telecommunications. I believe that the Crown Corporation, Sask Tel, has, under the general direction and guidance from its directors, minister and the government, achieved the desired results without a formal regulatory authority.

Our views and observations on some of the matters raised by the Telecommission studies will reflect this unique position. However we trust that they will nevertheless assist the Telecommission in its endeavours.

I am enclosing herewith our submission on Telecommission Study I(c).

Yours very truly,



Deputy Minister & General Manager

TAH/lc
Att.

Telecommission Study I(c) - Concept of a Telecommunications Carrier

Outline of the view of Saskatchewan Telecommunications on each of the following headings of the study:

- A. Definition of Telecommunications - Telecommunications is generally the transmission of intelligence by means of facilities which use in whole or in part the medium of electro-magnetic waves. The definition should be broad enough to encompass the expanding technology and state of the art. The modern telecommunication technology requires a carrier not only to transmit a variety of signals but incidental to the transmission to also switch, store and transform the signals.
- B. Definition of Telecommunications Service - Telecommunications service is a service, the predominant purpose of which is to make available the means or the medium facilities required to transmit intelligence over a distance without changing the substance or content of the intelligence. The service is the "medium" as distinct from the "message".
- C. Definition of Telecommunications Carrier Function - The basic function of the carrier is to furnish the medium facilities required for telecommunications. These facilities encompass the organization, plant and personnel necessarily associated with supplying the medium. Ideally these will include all facilities and equipment which, by reason of the technology involved and the co-ordination and controls required, cannot be successfully divided in ownership or responsibility without a penalty in the quality or cost of the message.
- D. Definition of Telecommunications Carrier Obligations and Rights
If a public utility can be described as a system that supplies one fundamental collective common need or want to a group of people by means of one system, a public telecommunications service is the truest and broadest concept of a public utility because theoretically each of the people in the group require connection with every other person to enable the function to be complete. However specialized services not required by the general public can also be provided by the same system.
 - (1) Obligations to Users
 - (a) Equitable system of rates - For a public telecommunications service the principles of value of service and interdependancy of users are intrinsically appropriate to modify the normal cost principles. In other words

the value of the service to a person depends on whether the persons he wants communication with also have access to the service. Consequently every user has a vested interest in the access of others to the service. This principle supports some "rate averaging" to ensure maximum development and availability of the service. Assuming that the more people who have access to and can be reached by the service the more valuable the service is to everyone, then it is incumbent on the carrier to establish a system of rates that will permit as many as possible to have access and at the same time to produce the most efficient use of the facilities which are provided.

However, in its role as a telecommunications common carrier, the "telecommunications public utility" provides service to another group of users ----- those who need specialized communication not required by the general public.

These services are to some extent integrated with the general public service -----they are planned, administered and maintained by the same people, and for the most part they utilize the same buildings, rights of way, structures and equipment. These services, too, must be equitably rated.

We believe that in no circumstances should the general public service subsidize the specialized services. In the future, some of the specialized services, picture phone for example, may become universal, in which case their integration into the general public rate structure would be necessary.

Those services which will always be specialized can be controlled through a competitive process or by rate regulation.

- (b) Equitable connection of customer-owned equipment and systems. The arguments for carrier control over such equipment in the public telecommunication service are mainly associated with the fact that customer owned equipment amounts to a severance of control over the medium. The greater the number of severances to the medium the greater is the risk of increasing the cost and decreasing the quality of the "message". Obviously the problems of compatibility, fault testing, repair, maintenance, supervision, control and co-ordination

become more complex when there is a severed responsibility over equipment performing an inseverable function.

The opposing argument stems from the inherent monopolistic nature of the public telecommunications service. This is the problem of control over innovation. It is impossible to divorce the medium from technology and technology from innovation. Much of the innovation is associated with terminal equipment which is essentially part of the medium. The two extreme positions relative to control over innovation are: (i) permitting the customer to choose his terminal equipment from the competitive market, or (ii) to include in the carrier's franchise the right to own and provide all of the terminal equipment. There are difficulties in both extremes - the one creating problems associated with divided ownership and control of the medium and the other the question of stifling innovation.

Sask Tel's view is that, in general, terminal equipment is an integral part of the medium, rather than part of the "message" and consequently is part of the function of the carrier rather than that of the customer. The problems associated with customer owned equipment will produce cost and efficiency penalties far offsetting any advantage gained in innovation.

However, in the case of specialized services, which are not part of the general public service, the connection of customer-owned equipment is desirable provided that the integrity of the network is safeguarded.

Attempts to foster innovation should not include any action which would impair the integrity of the telecommunications service.

- (c) Provision of service on demand - A carrier must be prepared to provide the monopoly services on demand in the area where the carrier has assumed responsibility for service. This is a particularly difficult principle to extend to remote and sparsely populated areas due to prohibitive cost. Consequently the policy or regulatory recommendations or decisions of the controlling agencies respecting rates and revenues will affect the ability of the carrier to provide service on demand.

- (d) Liability for telecommunication malfunction or misuse. While accepting the basic responsibility to convey the message with speed and accuracy, the carrier should continue to be protected from liability, other than rebate of rental, for failure of equipment.
- (e) Legal right of user to privacy - The prevailing view of the telecommunication carriers is that the privacy of telecommunications must be strictly maintained, subject only to essential service observing by the carriers and strictly controlled electronic eavesdropping by law enforcement agencies in cases where it is necessary to control and prevent serious criminal activities.
- (f) Quality of service and continuity - It is necessary to have some industry standards of reliability and quality of service applicable to all systems. However, because of economics it may be necessary to have lower standards for certain uneconomic areas and services within a system, provided the total system itself meets the industry standards. Where a lower grade system to serve a remote isolated community is the best service that can be provided without substantial additional cost such system should insofar as practical be permitted to operate at a lower level of standards than the average.

(2) Rights

- (a) Franchise - There are two basic factors in franchise, namely: geographic area and scope of telecommunications services. The geographic area is relatively simple to define, whereas the scope of services problem is very complex. The traditional telephone and telegraph functions are no longer the severable functions they once were. Technology permits and economics demand that the network facilities provided by the telephone system to serve virtually every place of residence and business in Canada be also used to provide many new services in addition to voice communications. Sask Tel believes that these universally used services constitute a natural extension of the traditional telephone monopoly and are properly the exclusive responsibility of the telephone system since it is singularly capable of providing them to every address.

The franchise of Sask Tel is given by its act of incorporation and this franchise is exclusive insofar as provincial legislation can grant exclusiveness in public telecommunications. No other public telecommunication carriers, except broadcasters and telegraph companies authorized by federal charter or license, operate in Saskatchewan. (Note - Non-profit rural telephone companies are also still permitted to serve farmers in Saskatchewan.)

- (b) Right of Way - Since public communication services are as essential as public highways they must be assured the necessary rights of way over land. Historically public communication lines have been regarded in the same light as essential transportation and in common with sewer, water and power services have been afforded the free franchise to use public highways, streets and lanes etc. for the purpose of installing the necessary facilities.

In the interests of efficient and orderly use of land and rights of way the same rights should be extended to the use of railway rights of way where telecommunication facilities can be accommodated without undue interference with the railway needs. Often the railway right of way is the shortest distance between two points and may be the most ideal route for buried telecommunication cable. Sask Tel believes that railway rights of way should serve these purposes at reasonable rates competitive with rates on adjacent land.

- (c) Right of access to capital market - The availability of capital depends on an adequate level of earnings. The access to the capital market and the cost of capital are factors which often determine whether geographic extension, expansion of services, modernization and innovation will occur in telecommunications. In the case of Sask Tel the provision of borrowed capital for these purposes depends on the government's order of priorities as between telecommunications and other demands for capital. A reasonable rate of return helps ensure the provision of such capital for telecommunications.

- (d) Right to plan construction - Whereas a regulatory agency or advisory board may logically play a role in establishing over all objectives the carrier must have freedom and flexibility in planning its programs.

In the case of Sask Tel the government exercises broad influence on Sask Tel's construction policy but Sask Tel determines the construction program.

- (e) Right to establish rates - For monopoly services Sask Tel, in common with other carriers, is required to have published tariffs. The ideal situation appears to be one where the regulatory body does not interfere with such tariffs except:

- (i) To generally guide the carrier toward the national or provincial objectives in telecommunications.
- (ii) To exercise general control over the economic health, efficiency and net return of the carrier.
- (iii) To provide a right of appeal against any unjustified discrimination or inequity in the tariffs.
- (iv) To encourage or guide innovation in the interests of the overall objectives.

In the competitive services it should not be necessary to regulate a carrier's rates except to ensure that the carrier is not subsidizing these services from the revenues of monopoly services.

PUBLIC UTILITIES BOARD



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REFER TO FILE NO. P.U. 7790

PROVINCE OF ALBERTA

900 DEVONIAN BUILDING
11160 JASPER AVENUE
EDMONTON 12, ALBERTA

March 13, 1970

**A. E. Gottlieb, Esq.,
Deputy Minister of Communications,
Government of Canada,
Ottawa 4, Ontario.**

Dear Mr. Gottlieb:

**Re: Telecommission Study 1(c)
Concept of a Telecommuni-
cations Carrier**

The Board has given serious consideration to the invitation contained in your letter of February 24, 1970 for any observations which the Board may wish to make concerning Study 1(c) of the Study Programme to be undertaken by the Telecommission of which you are Chairman. In addition The Honourable Raymond Reierson has been apprised of your request.

It is important at the outset that you have an appreciation of the Board's attitude with respect to requests of this nature and in particular reference should be made to the reference to "national telecommunication policy" in the first paragraph and "Study 1(c) - 'Concept of a Telecommunications Carrier' - which we regard as an urgent matter for policy consideration" as used in the last paragraph on page 1 of the letter dated February 10, 1970 to The Honourable R. Reierson by The Honourable Eric Kierans, Minister of Communications.

The Board, as you know, is the agency established by the Legislature of this Province to, among other things, regulate the rates of public utilities, which includes util-

ities defined as,

"any system, works, plant, equipment or service for the conveyance of telegraph or telephone messages"

Sec. 2 clause (j) subclause (i)
cap. 85, S.A. 1960

The Board was originally created by cap. 6, S.A. 1915 and the jurisdiction and powers of the Board as then created remain substantially the same at the present time.

In any decision and order which it issues the Board acts in a quasi judicial capacity and all such decisions and orders are subject to appeal to the Appellate Division of the Supreme Court of Alberta on questions of jurisdiction or law. No provision is contained in the statute for a review by the Cabinet. Consequently it is the Board's view that it is bound to act in a judicial manner, and in so doing should not engage in activities that have reference to establishing policy which the Board considers is the perogative of the Legislature.

With these prefacing remarks it is now necessary to consider what suggestions the Board can make toward assisting the Telecommission in attaining the aims and objects with which it is charged.

It occurs to the Board that broadly speaking the two areas on which revision is necessary as a primary requisite have reference to "regulation" and "accounting". These may be summarized as follows:

- (1) Revision and uniformity in the legislation across Canada which has reference to telecommunication utilities; e.g., The Alberta Public Utilities Board Act certainly requires some expansion of the words "telegraph or telephone" in referring to communication utilities.
- (2) Uniform accounting systems on a nation-

wide basis with the object of assisting the utilities and regulatory agencies in determining revenue-sharing, cost determination and tariff development on a fair and reasonable basis.

As the development of the work program proceeds there may be other topics on which you consider the Board may be in a position to offer suggestions and this the Board is quite willing to do subject, of course, to the constraints referred to above.

Yours truly,

[Signature]
Chairman

WN:gc

cc.

The Honourable H. E. Strom,
Premier, Province of Alberta.

The Honourable R. Reierson,
Minister of Telephones,
Province of Alberta.

Telecommission Study 1 (c)

Concept of a Telecommunications Carrier

Submitted by:

Honourable R. Reierson

Minister of Telephones

and

Minister of Labor

on behalf of

The Province of Alberta

March 31, 1970

The Province of Alberta is pleased to take this opportunity to express its views on Telecommission Study 1 (c), "Concept of a Telecommunications Carrier".

It is our understanding that telecommunications means:

"the system required for the emission, transmission or reception of images, signals, signs, sounds, writing or intelligence of any nature by radio, visual, wire, or any other electro-magnetic means."

A telecommunications service is one where:

"the primary purpose is to carry out a function of telecommunications."

The function of a telecommunications carrier is:

"the provision of telecommunications services to others for compensation."

The Province of Alberta has defined a public utility as:

- i any system, works, plant, equipment or service for the conveyance of telegraph or telephone messages,
- ii any system, works, plant, equipment or service for the conveyance of travellers or goods over a railway, street railway or tramway
- iii any system, works, plant, equipment or service for the production, transmission, delivery or furnishing of water, heat,

light or power, either directly or
indirectly, to or for the public, and
iv any oil pipe line the proprietor of which
may be declared by the Oil and Gas
Conservation Board to be a common carrier;

Since the telecommunications carrier falls within the above definition of a public utility, it is the opinion of the Province of Alberta that as such, the carrier should assume and have the following obligations and rights:

OBLIGATIONS TO USERS

Equitable System of Rates

Rates charged by a telecommunications carrier should not be unduly discriminatory. They should be fair and reasonable and under similar circumstances should be the same to all persons throughout the telecommunication carrier's territory.

Under such a rating system it is recognized that a cross-subsidization of revenues between and within the various services offered by the carrier is necessary so as to allow the basic telephone service (local) to expand to the greatest extent throughout the carrier's territory in order that the service can be provided and be available to all income groups. Further, this cross-subsidization concept allows the extension of the basic service into the uneconomical, remote and rural areas of the territory at rates which are quite comparable to rates charged in the larger urban areas.

Equitable Connection of Customer Owned
Equipment & Systems

The Government of Alberta is of the opinion that in certain cases it is in the public interest that the connection of customer owned equipment or systems with the telecommunications carriers' facilities should be allowed. In permitting such connection the economic viability of the carrier must be considered and of final importance is the ultimate effect that such connection would have on the rates charged to the general user of the basic network. Further, under no circumstances should the connection of customer owned equipment or systems bring about any degradation in the quality of service now available or that may be deemed desirable in the future.

The Provision of Service on Demand

The Alberta Government is of the view that the telecommunications carrier, subject to the payment of the appropriate rates and charges; subject to conditions concerning misuse, or where an inequitable monetary burden would be incurred by the telecommunications carrier, should, within a fair and reasonable installation interval, provide basic telephone service to its customers.

Liability for Telecommunication Malfunction
or Misuse

The Government is of the opinion that the telecommunication carriers have at present a limitation of liability regarding the transmission or conveyance of information. We feel that the current limitation should continue. However, this should not negate the responsibility of the carrier to insure that

every precaution is taken to ensure accuracy in the conveyance of all information.

Legal Right of User to Privacy

The Government of Alberta is of the opinion that it is not technically or physically possible to protect or ensure complete privacy for the telecommunication user especially with the advent of electronic eavesdropping. We feel that Federal or other legislation be considered to penalize any offenders. At the same time the telecommunication carriers should be permitted to take every possible caution to protect the legal right of the user to privacy.

Quality of Service and Service Continuity

It is felt that the telecommunications carrier should be obligated to establish telecommunication standards. Such standards should be submitted by the telecommunication carriers for consideration and approval by their Regulatory Agency. The approved standards should apply equally to all telecommunication carriers.

RIGHTS

Franchise

The Government of Alberta strongly feels that a telecommunication carrier should be awarded a franchise or exclusive right within a given geographical area, preferably a Province, to provide telecommunication services for compensation. This is necessary to achieve maximum economic benefits that accrue

from such an arrangement and to implement basic rating concepts.

At present the areas served in Canada by the existing telecommunication carriers generally conform more or less with Provincial boundaries. We believe this provides for the most efficient economic planning with the benefits of regulatory control through regional agencies familiar with the problems in the franchise area. For broader and more national problems these regional agencies and franchised carriers must co-ordinate overall Canadian planning by means of association or consortium. A franchised telecommunications carrier in each area should be required to fulfill its service obligations to all users.

Right-of-Way

The Government is of the view that the telecommunications carrier should be able to obtain and use right-of-way for telecommunication facilities at the lowest possible cost, consistent with the right of land owners. This may be accomplished through the placement of telecommunications facilities in ditches along the shoulders of highways. This is one of the most economical methods of providing facilities. There should also be expropriation rights for telecommunication carriers, subject to appeals concerning the necessity for and compensation to be paid for the right of way.

Legislation should also be considered for a right of way in the air to protect the microwave transmission routes of the telecommunication carriers. Excessive costs can be incurred by the telecommunications carriers which in the end must be borne

by the users if it becomes necessary to carry out major microwave re-routes.

Right of Access to Capital Market

The Government of Alberta is of the opinion that if the telecommunication carriers are to benefit from good management and provide for the orderly financial growth of their companies, it is essential that they should have access to the capital market at the times and on the terms they consider advantageous. There should be no controls, unless it is deemed necessary in the national interest, to restrict the total amount of capital raised in any given domestic or foreign market.

Right to Plan Construction

Because of varying regional developments and their associated service requirements the Government of Alberta believes that only the management of the local telecommunications carriers concerned are best able to be aware of the requirements to decide where, when and how new facilities and technological advances should be introduced into the telecommunications system. The right of a telecommunications carrier to plan its own construction program should be left with the carrier since it is the carrier who must assume any financial risk and responsibility.

Right to Establish Rates

The Government of Alberta is of the opinion that rates should be established by the telecommunication carrier in the same way as by other public utilities. This is necessary since

rates are based to some degree on judgement and value of service and not entirely on cost. The inter-relationship of rates between services must be considered carefully as well as the rate levels for the competitive services. Because of the system-wide utility rate averaging approach which is used and has historically been accepted and therefore the Alberta Government feels that rate levels should be determined by the telecommunications carrier, subject to the approval by its regulatory agency. The criteria which the regulatory agency must use in approving or disapproving telecommunication carriers' rate structures should be clearly defined through legislation.

PUBLIC UTILITIES COMMISSION

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PROVINCE OF BRITISH COLUMBIA

FILE NO. UG-860

P.O. BOX 1204, VICTORIA,

April 2, 1970.

Mr. A.E. Gotlieb,
Deputy Minister of Communications,
OTTAWA 4, Ontario.

Dear Mr. Gotlieb:

I must apologize for not replying earlier to your letter of February 24th enclosing copy of a letter from The Honourable Eric Kierans to Premier W.A.C. Bennett. The Commission and its staff have been exceptionally busy on matters of local urgency, and it has therefore not been possible to devote as much time for consideration of the terms of reference of Study 1(c) as I would otherwise have wished to do.

The fact is this Commission has no contribution to offer at this time regarding "Concept of a Telecommunications Carrier". I believe that as the course of the study progresses we may well have opinions on a number of aspects. If therefore an opportunity occurs at a later stage in the study where observations might be made, I would be pleased to consider the subject again.

I have replied already to Mr. Hindley's letter which posed certain specific questions but as the field of telecommunications in B.C. is dominated by companies under Federal rather than Provincial jurisdiction, the Public Utilities Commission has not up to this time involved itself a great deal with the broad concept.

While it has not been possible to offer anything constructive at this stage, let me assure you of this Commission's interest in the study. I will appreciate being kept informed as the work progresses.

Yours very truly,

J. F. K. English
J. F. K. English,
Chairman,
PUBLIC UTILITIES COMMISSION.

THE CANADIAN ASSOCIATION OF BROADCASTERS

TELECOMMISSION

SECTION I - STUDY I (C)

CONCEPT OF A COMMON CARRIER

OTTAWA,
MARCH 31/70

A PRELIMINARY REVIEW OF TELECOMMUNICATIONS CARRIERS IN CANADA

Telecommunications carriers are for the purposes of this brief review deemed to be those corporations, such as telephone and telegraph companies and Telesat Canada, whether subject to federal or provincial jurisdiction, which hold themselves out as offering telecommunication services and paths for hire to the public. Telecommunications in this context is deemed to be that as defined by Section 28(38) of the Interpretation Act, C.7 R.S.C., 1967-68.

Common Carrier:

"A common carrier is a person who undertakes for hire to transport from a place within the realm to a place within or without the realm the goods or moneys of all such persons as think fit to employ him."

"To constitute a person a common carrier he must be ready to carry for hire as a business and not as a casual occupation. It is essential that he should hold himself out as being ready to carry goods for any person or to carry any passengers no matter whom they may be. If he carries for particular persons or certain passengers only, he is not a common carrier, and the relationship between him and the carrier of the goods or the passengers is one of special contract. If he retains a right of selection as to whom or what he shall carry he is not a common carrier."

Halsbury, Vol. 7, p. 131

As to "Analysis of the Constitutional and Legal Basis for Regulations of Telecommunications in Canada", see C.A.B. Brief re Telecommunications Study 1-A March, 1970.

A carrier may hold himself out as prepared to carry only particular kinds of goods (e.g. oil or gas by pipe line), in which case he is a common carrier only of such goods. Similarly, he may carry only from A to B and not A to C to B in which case he is a common carrier from A to B.

A person is a common carrier because he professes to carry commonly, that is for all members of the public upon equal terms.

"A common carrier is not bound to carry as a common carrier. He may enter into contracts to carry as a private carrier. He may also limit his liability in one or more respects without ceasing to be a common carrier and liable as such in other respects. Whether he is carrying as a private carrier or a common carrier with limited liability, depends upon whether or not the contract of carriage is such as to obliterate or destroy his character as a common carrier."

Halsbury, Vol. 4, p. 134.

Thus, the common carrier must:

- (1) carry all that is tendered to him, so long as he professes to carry that which is tendered, has room to carry, and payment is tendered;
- (2) he must treat all customers equally, that is he must charge the same rate for carriage of the same goods for the same distance;
- (3) finally, the liability of a person who makes a public profession of common carriage is fixed by custom, subject to limitations on liability fixed by statutes; and as such, he is the insurer of the goods carried.

A common carrier is responsible for the safety of the goods entrusted to him in all events, save acts of God, the Queen's enemies, the fault of the consignor or inherent faults of the goods themselves. With the exception of limitations of liability arising from statute or contract, the common carrier's liability is extensive.

Common Law Attitude To Telecommunications Carriers:

The degree of liability for loss in the absence of negligence, has been the main reason why historically, in the absence of statutory enactment, English, Canadian and American courts have held telecommunications carriers not to be common carriers. The courts have traditionally been unable to bring themselves to the view that messages or signals communicated electronically could be carried with the same degree of certainty as goods or persons, particularly where that which is tendered for transmission undergoes, in the course of being carried, a fundamental change in character (e.g. from word, picture or data to electrical impulse).

The leading case on this subject is Baxter v. Dominion Telegraph Co. 37 U.C.Q.B. 1874-75 at p. 470. In this case one F. Baxter sent a telegram from Hamilton, Ontario to one John Hobbs in New York on June 17, 1872. It subsequently transpired that Mr. Hobbs failed to receive the telegram, Baxter suffered a financial loss through Hobbs not doing what he was requested to do and Baxter sued the telegraph company for damages. In arguing their case the plaintiff contended that the telegraph company was analogous to a railway company as a common carrier and liable without proof of negligence.

Morrison J. dismissed the plaintiffs' appeal on the grounds that the defendants had performed their part of the contract under the terms and limits of liability as set out in the contract between the plaintiff and the defendant company. The Court found that the plaintiff was aware of the conditions and that they were not in any event unreasonable.

His Lordship then dealt with the argument as to the telegraph company being a common carrier and subject to the common law rules as to liability, and he quoted from the American case of Breeze v. United States Telegraph Co. 45 Barb. 274 where the court said, "I cannot refrain from observing here, that the business in which the defendants are engaged, of transmitting ideas from one point to another by means of electricity operating upon an extended insulated wire, and giving them expression at the remote point of delivery, by certain mechanical sounds, or by marks, or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods, and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter is controlled and regulated can have very little just and proper application to the former. And all attempts heretofore made by Courts to subject the two kinds of business to the same legal rules and liabilities, in my judgment, will sooner or later have to be abandoned, as clumsy and indiscriminating efforts and contrivances to assimilate things which have no

natural relation or affinity whatever, and at best but a loose or mere fanciful resemblance."

And further, His Lordship quoted with approval Western Telegraph Co. v. Carey 15 Mich. 525, where in holding that the company was not a common carrier, "We are all agreed that Telegraph companies, in the absence of provision of statute imposing such liabilities, are not any common carriers, and their obligations and liabilities are not to be measured by the same rules; that they do not become insurers against all errors in the transmission and delivery of messages."

One can't help but be entertained at the thought of the Court's reaction in the Breeze case had it been suggested that the message had been communicated not by wire, so as to contain the electric impulse, but by microwave.

Statutory Change:

Be that as it may, Parliament, by virtue of the Railway Act R.S.C. 1952, c. 234, as amended, has now in effect, declared that telecommunications carriers subject to federal jurisdiction are common carriers. The significant change in this regard was the introduction of section 381 A, which is identical to action 353 of the same Act but applicable to Railway companies,

"318-A (1) No contract, condition, by-law regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of any traffic shall, except as hereinafter provided, relieve the company from such liability, unless the class of contract, condition, by-law, regulation, declaration or notice has been first authorized or approved by order or regulation of the Commission."

This Section goes so far as to require the telecommunications carrier to obtain approval of any and all contracts proposing to limit liability, and presumably such restrictions apply to private wire service contracts as well as services offered to the public at large.

Still, a more recent amendment to the Railway Act, Bill C-11, inter alia, amended ss. 2 of Section 381 so as to apply the test of "unjust discrimination" and "Undue or unreasonable preference, prejudice or disadvantage" to the service or facilities provided by telephone and telegraph companies, as well as tolls, to private wire service customers.

All of which provisions, together with other requirements of the Act, place federal companies offering telegraph and telephone services squarely within the context of the qualities traditionally ascribed to common carriers of goods and persons.

Telecommunications carriers are thus common carriers, engaged in the transportation of communications from a sender to a receiver whether the method be land line, or microwave and whether the signal transmitted is in origin and reception voice communication, telegraph signal, visual image or data.

Obligation to Broadcaster User, whether under public or private contract user relationship.

(a) Equitable System of Rates

The relationship of the telecommunications common carrier to the broadcaster is one of essential interdependence, made all the more so since by statute and regulation one is denied, at least in the federal sense, the right to perform the functions of the other. This condition is compounded to the extent that the reception of broadcasting throughout Canada is desired in the national interest. Under such circumstances the broadcasters should stand in no more favoured position than other users, nor in the alternative should they stand in any less favourable relationship. Thus, to the extent that the basis of licensing broadcasters to operate radio and television systems should be under circumstances which make the operations economically viable, sufficient to permit a level of programming consistent with the goals enunciated by the C.R.T.C., charges by common carriers to broadcasters should be fair and reasonable having regard to the service to be supplied both by the common carrier and the broadcaster. Thus it is essential that there be a process by which the broadcaster-user can obtain arbitration in cases of dispute as now afforded customers or potential customers of common carriers subject to federal jurisdiction under the provisions of the Railway Act. Such a process of arbitration is essential where the service equal in quality and reliability to be supplied cannot be obtained under competitive circumstances.

(b) Equitable Connection of Customer-owned Equipment and Systems.

The connection of customer-owned equipment and systems to facilities provided by a common carrier is a matter to be decided on the facts and circumstances of each situation. This being the case it remains only to be observed that the Act of Bell, S. 5 s.s. 4 & s.s. 5, provides for such connection where there is technical compatibility and where under the circumstances it is reasonable for such connection to be made.

One of two procedures might be employed to ensure that arbitrary decisions are not imposed on broadcasters, either that a dispute arising out of such a matter be referred to the appropriate common carrier regulatory agency for resolution, or that the right to make connections of broadcaster's equipment be made part of the broadcaster's license, subject to the approval of the Department of Communications.

(c) Provision of Service on Demand

To the extent that a licensee being authorized to carry on a broadcasting undertaking is performing a useful and oft-times essential public service, the availability of the coincident service and facilities to be performed and supplied by the common carrier is essential. This relationship requires a high degree of co-ordination and consultation on the part of all parties. Not only can an existing system of a broadcaster be frustrated in its performance by failures on the part of the carrier, but the extension of its authorized service can be seriously impaired as well. In either case the economic consequences may be such as to seriously effect the presently operating broadcasting undertaking. The resulting loss and damage is measurable not only in economic terms but in the absence of service intended and authorized to be performed by the licensee as part of the Canadian broadcasting system.

Thus, where existing broadcasting facilities are to be extended or improved or where new systems are to be inaugurated, it is not only necessary that the carrier establish for the agency authorizing the broadcasting facility that it is ready and able to perform at rates which are reasonable, but that provision be made for indemnification in case of default on the part of the carrier. Similarly the carrier subject to provincial jurisdiction should be held equally accountable for performance.

(d) Liability for Telecommunications Malfunction or Misuse

We have earlier noted that Section 381-A of the Railway Acts provides that all contracts, conditions, by-laws, etc. of common carriers proposing to limit liability must be first authorized by the Transport Commission. We have also observed that this Section is virtually identical to Section 353 of the same Act, but applicable to railway companies. This section as it now applies to telecommunication common carriers is fundamental to the very concept of a common carrier as the insurer of the goods carried subject to limitations on liability as authorized and approved by either the statute or the regulatory agency.

The extension of this concept to telecommunication carriers in Canada is new, although the Bell has for some time expressly limited the extent of its liability. The Bell takes the position that it does not transmit messages but simply provides the service and equipment which enables the customers to use such services and facilities to effect the transmission.

Based on this definition and its role the Bell then proceeds to advise that it does not guarantee uninterrupted working of its service or equipment. (Rule 36 of Bell regulations as approved by Board of Transport Commissioners.)

It is almost trite to say that this matter of liability arising out of malfunction or misuse is of great complexity, but indeed it is of such complexity and significance that we desire to give consideration and comments on it as a separate item at a later date.

(e) Legal Right of User to Privacy

We understand that this item is the subject of a special study, and we propose to reserve comment here until we have had the benefit of reviewing the study.

(f) Quality of Service and Continuity

The comments made earlier under sub-heading 1(c) are equally appropriate here to the extent that the service and facilities supplied to a broadcaster by the carrier are of such essential significance that the provision of quality of service and continuity of service goes to the very performance of the broadcasters responsibilities. To this extent the carriers have a direct and unqualified responsibility to ensure to the broadcaster-user the highest and most immediate degree of quality service and continuity in the maintenance of their responsibilities under any contract. To the degree that this is not, from time to time, possible the broadcaster should be free to ensure that continuity of such facilities will be secured. This may well mean that broadcasters should be encouraged to own, operate and

maintain their own studio to transmitter facilities be they line or microwave, thereby ensuring to themselves continuity in the event of wide spread common carrier systems failures where under such circumstances the re-establishing of broadcaster's facilities might not be of immediate priority.

Where carriers fail to maintain quality of service or continuity the broadcaster should have recourse to the appropriate regulatory agency for relief. It remains to be seen how the Transport Commission applies the various provisions of the Railway Act to issues raised by customers, and further the interpretation which will be placed on these various clauses by the Courts. Suffice to observe that the Act now appears to afford customer, including private wire service customers, much broader recourse to the Commission and the courts in cases of complaint or dispute as to tolls, service, facilities and liability. It need be noted, however, that to the extent to which various telephone and telegraph companies are subject to provincial jurisdiction the degree of provincial public utility regulations is less than that now found within the Railway Act.

Rights: Having briefly touched on the responsibilities of such common carriers, in the context of service, equality and liability, it remains to be observed that such carriers enjoy certain rights not otherwise extended to non-carrier undertakings.

These features are of such common knowledge and understanding that they need only be summarized:

- (1) Exclusive area of operation. The franchise concept of telecommunications operations is a consequence of the high capital cost of such undertakings and the need to maximize the effective economic use and operation of such facilities. Having an exclusive franchise as to area of operations, telecommunications carriers in Canada are subject to either federal or provincial rate, plant and service regulation.
- (2) Right of access for plant facilities. Telecommunications companies subject to the jurisdiction of Parliament under section 92 (10) (a) of the British North America Act, 1867 as well as companies subject to provincial jurisdiction have extraordinary rights in locating their facilities so as to achieve the maximum economies of plant.

(3)

Subject to limited exceptions telecommunications carriers with exclusive areas of operation have as a consequence of size (assets), ascertainable market growth and demand relative ease of access to capital markets not otherwise enjoyed by other business operations. The fact that associated costs of capital are an element of cost for rate purposes has tended to considerably reduce the risk element otherwise inherent in the cost of capital for other businesses. Related to the cost of capital has been the carrier's ability to anticipate future plant requirements on the basis of experience, population and general economic growth and the absence of direct or extensive competition.

(5)

Finally, such carriers, being subject to a regulation of rates, are also the beneficiaries of a basic rate of return which tends to provide a floor for earnings as well as a ceiling.

To the extent that the Railway Act determines the common carrier characteristics of telecommunications carriers subject to federal jurisdiction, it is left to outline the statute law applicable to companies subject to provincial jurisdiction.

(See C.A.B. Brief re Telecommission Section 1, Study 1 (d))



Canadian Cable Television Association

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TELECOMMISSION STUDY 1 (C)

CONCEPT OF A TELECOMMUNICATIONS CARRIER

Submission

by

July, 1970

CANADIAN CABLE TELEVISION ASSOCIATION

TELECOMMISSION STUDY 1 (C)CONCEPT OF A TELECOMMUNICATIONS CARRIER

The Canadian Cable Television Association is pleased to submit this brief in connection with Telecommission Study 1(C) Concept of a Telecommunications Carrier. The views expressed in this brief should be read in conjunction with the views expressed by CCTA in connection with other Telecommission Studies.

In our remarks we have assumed that Study 1(C) is seeking a conceptual definition of the classes of activities to be subject to future Telecommunications legislation and a definition of the obligations and rights of those engaged in these activities.

A. DEFINITION OF TELECOMMUNICATIONS

The Canadian Cable Television Association believes that the definition of "Telecommunications" used in the Canadian Overseas Telecommunications Corporation Act and elsewhere is useful and acceptable:

"....any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic system."

B. DEFINITION OF TELECOMMUNICATIONS SERVICE

The terms of reference of this study also call for a definition of a "Telecommunications Service". Being unaware of any requirement for a specialized meaning, we would be inclined to define a "Telecommunications Service" as any service in which "Telecommunications" is the principal ingredient. Obviously, under this definition a "Telecommunications Service" may also involve other important and necessary ingredients which are not "Telecommunications" per se. The present cable television basic function is largely on Telecommunication but other activities of a non-Telecommunication nature are involved in providing this total Telecommunication Service. On the other hand, many services that we would not regard as "Telecommunications Services" will nevertheless be highly dependent upon "Telecommunications". As an example a Stock Broker may rely on the use of Telecommunications to provide up-to-date information but it is not the principal ingredient in the service provided.

We have stated elsewhere that, in our opinion, cable television is first and foremost a telecommunications service.

C. DEFINITION OF TELECOMMUNICATIONS CARRIER FUNCTION

Just as a wide range of services will utilize "Telecommunications", a wide range of organizations will themselves wish to engage in "Telecommunications". It would be neither reasonable nor useful to suggest that organizations involved in "Telecommunications" could not carry on other activities or that organizations engaged in other activities could not become involved in "Telecommunications". In seeking to define various activity classifications in "Telecommunications" we believe that the various roles or functions should be classified, not the organizations.

The terms of reference for this study seek a definition of a "Telecommunications Carrier Function". Again, being unaware of any requirement for a special meaning we would be inclined to define the "Telecommunications Carrier Function" as the function of carrying on telecommunications per se. This function may be performed either by itself

or as just one of several ingredients which combine to form the total service. In Exhibit 1 we have attempted to divide the universe of "Telecommunications Carrier Functions" into a number of conceptual classifications. While it should not be necessary to argue the conceptual existence of these classifications, we do feel that it is important to recognize the practical importance of each.

First of all, "Telecommunications Carrier Functions" can be differentiated on the basis of for whom the function is performed. It may be performed for oneself, for a limited number of other persons by mutual agreement, or for the general public on demand. It is obviously necessary to allow for each of these possibilities.

Cable television is perhaps a good example of a situation in which a company will wish to perform a "Telecommunications Carrier Function" for itself as a necessary ingredient in the "Telecommunications Service" that it offers to its subscribers. In transportation the analogy would be to a company or store whose vehicle collects, carries and delivers its own goods.

Trans-continental television microwave might be an example of a function that would be provided for others only by mutual agreement. It might be economically and technically undesirable to require that such a service be offered to others only when it can also be offered to all commers on the same basis. In transportation the analogy would be to a company that carried goods for a third party under contract (e.g. as private firms carry mail for the Post Office); it would clearly not be sensible to require that any company that carries goods for a third party must be prepared to accept goods from anyone.

Our basic telephone service is a good example of a function performed for the public on demand. Generally speaking, we would include in this class those functions that are universally required, are of an essential nature and not namely available by alternate means. Frequently, the obligation of providing such services will be placed on specific companies -- sometimes with exclusive franchises and other rights being given to these companies. In transportation the analogy would be to the common carrier.

"Telecommunications Carrier Function" can also be differentiated on the basis of whether the function is unregulated or regulated. In our society we have generally

accepted the view that individuals and organizations should have the freedom to proceed in accordance with their own judgement and that laws and regulations should restrict them from doing so only if and when it is clear that such sacrifice of freedom is necessary for the common good. This is not an empty dogma, it is the principle on which our technological and social progress has been based. It will be necessary to have both regulated and unregulated "Telecommunications Carrier Functions" -- regulated where the need is clear but unregulated if the need has not been demonstrated.

We are always concerned about the tendency of government to seek order where there is disorder, tidiness where there is untidiness, rationalization where there is a lack of rationalization -- in short, to save us from the essential characteristics of our free enterprise system. In telecommunications we are particularly concerned about the tendency to think in terms of total regulation. In our view, total regulation of telecommunications would result in a disasterous loss of the innovative ingredient -- an ingredient that is already too scarce in our country. There is constantly before us a host of new approaches to be tried, new opportunities to be pursued, new services

to be offered. By their very nature these new developments are not likely to be of immediate national consequence. If it were necessary to seek government approval from government or a third party to do anything new or to try anything different, then innovation would be disasterously curtailed on a national scale. It is sometimes argued that regulations should precede new developments because, otherwise, regulation is faced with a fait accompli. We reject this argument. The cost of being faced with a fait accompli is, in our view, inconsequential relative to the cost to our nation of inhibiting innovation. We strongly urge that the importance of unregulated "Telecommunications Carrier Functions" be recognized.

Where does cable television fit into the universe of "Telecommunications Carrier Functions" outlined in Exhibit 1? This will depend on the particular function under consideration. Our traditional reception service will fit into one category. A closed circuit hook-up among a group of schools would obviously fall into another category. An information retrieval service for subscribers at large would fall into still another category. Some functions will be regulated while others will be unregulated. Some supplementary programming

services might not fall within the scope of "Telecommunications Carrier Functions" at all. Cable systems are in a position to perform a wide variety of functions and these functions are likely to cover the entire range of possible classifications.

D. DEFINITION OF TELECOMMUNICATIONS CARRIER OBLIGATIONS AND RIGHTS

Our comments regarding obligations and rights in connection with "Telecommunications Carrier Function" apply directly to the "Regulated Public Carrier Function" that we have identified in Exhibit 1. However, some of our comments are also applicable to other categories.

(1) Obligations to Users

a) Equitable system of rates:

The rates associated with a regulated public carrier function should be equitable taking into account the capital invested, the risk, the term of the investment, etc. However, it must be recognized that the rate for some services is already effectively controlled by the marketplace and further control would be superfluous.

- b) Equitable connection of customer-owned equipment and systems:

There should be an obligation to accept reasonable connections of customer-owned equipment and systems which meet appropriate engineering standards.

- c) Provision of service on demand:

There should also be an obligation to provide service on demand to the public within the designated service area. This obligation should relate only to the particular regulated public carrier function.

- d) Liability for telecommunication malfunction or misuse:

Liability for malfunction should be limited to the value of the undelivered service.

- e) Legal right of user to privacy:

Privacy on a telecommunications system is desirable but this requires specification and definition responsive to the technological nature of the system under consideration. Some users of the facility may choose, for some services, a non-private facility if such can be offered at a lower rate.

f) Quality of service and continuity:

The quality of service and continuity of service should be defined by specification.

(2) Rights

a) Franchise:

A regulated public carrier may be granted a franchise to perform a particular telecommunications function with terms appropriate to that function.

b) Right of way:

Certain powers to obtain right of way may be granted, depending on the particular telecommunications function to be performed.

c) Right of access to capital market:

Companies performing regulated public carrier functions should have the right to obtain public financing, subject to any regulatory control that may be necessary to ensure the continuance of government policy and directives as to ownership, minority interests, etc.

d) Right to plan construction:

Any obligations imposed on the regulated public carrier function should allow sufficient forward

lead time so as to permit efficient planning
and construction of the telecommunications
plant.

e) Right to establish rates:

Rates associated with a regulated public carrier
function should be set by the carrier, subject
to review or approval by the regulatory authority.

**TELECOMMUNICATIONS CARRIER
FUNCTIONS**

- Regulations of Function -

- Function Performed For -

		Unregulated	Regulated
		UNREGULATED PUBLIC CARRIER FUNCTION	REGULATED PUBLIC CARRIER FUNCTION
Public on Demand		UNREGULATED CONTRACT CARRIER FUNCTION	REGULATED CONTRACT CARRIER FUNCTION
Others by Agreement			
Self		UNREGULATED PRIVATE CARRIER FUNCTION	REGULATED PRIVATE CARRIER FUNCTION

CONCEPT OF A TELECOMMUNICATIONS CARRIER

Telecommission Section 1(c)

Submitted by:
Canadian National-Canadian Pacific Telecommunications

April, 1970

TELECOMMISSION

STUDY 1(c)

CONCEPT OF A TELECOMMUNICATIONS CARRIER

TERMS OF REFERENCE

Employing the following headings, we shall postulate what a telecommunications carrier should be:

- A. Definition of Telecommunications
- B. Definition of Telecommunications Service
- C. Definition of Telecommunications Carrier Function
- D. Definition of Telecommunications Carrier Obligations and Rights

(1) Obligations to Users.

- * a) Equitable system of rates.
- b) Equitable connection of customer owned equipment and systems.
- c) Provision of service on demand.
- d) Liability for telecommunication malfunction or misuse.
- * e) Legal right of user to privacy.
- f) Quality of service and continuity.

(2) Rights

- a) Franchise.
- b) Right of Way.
- c) Right of access to capital market.
- d) Right to plan construction.
- * e) Right to establish rates.

* These elements are the specific subject of other Telecommission Studies.

Telecommission Study 1(c)

Concept of a Telecommunications CarrierA. Definition of Telecommunications

"Telecommunications is the emission, conveyance, or reception of information by, in whole or in part, electro-magnetic waves."

B. Definition of Telecommunications Service

"A Telecommunications Service is a service whose predominant purpose is the emission, conveyance, or reception of information by, in whole or in part, electro-magnetic waves."

C. Definition of Telecommunications Carrier Function

"The function of a Telecommunications Carrier is the provision, for compensation, of Telecommunications Service to others, including any function incidental thereto, by means of any appropriate facility, apparatus or instrumentality."

Therefore the following is the definition of a:-

Telecommunications Carrier

"A person authorized to provide, for compensation, Telecommunications Service to others, including any function incidental thereto, by means of any appropriate facility, apparatus or instrumentality."

D. Definition of Telecommunications Carrier Obligations and Rights

A Telecommunications Carrier is included in the group of enterprises known as public utilities. This group, also includes transportation, power, water, gas, etc. These public utilities have a number of similar characteristics which generally include:

1. Being subject to government regulation
2. Supplying wants most fundamental to common living
3. Joint use is made of common facilities by customers
4. The use of an expensive physical network configuration
5. Monopoly or a restricted number of utilities providing a specific product or service in any one place.

The general relationship of these characteristics is evident in the following description of obligations and rights.

This section is not intended to be a list of all the rights and obligations of a Telecommunications Carrier. Items 1 (a) to 1(f) and 2 (a) to 2 (e) deal with certain important aspects of a Telecommunications Carrier's business.

(1) Obligations to Users

a) An Equitable System of Rates

It is understood that "rates" will be discussed in detail in Telecommission Study 7 (a).

In general the rates charged for Telecommunications Services should be just and reasonable. Such rates should not be unjustly discriminatory and, under substantially similar circumstances and conditions, similar rates should be charged to all persons.

As a general principle the rate charged for a Telecommunication Service should be compensatory. This should not preclude rate averaging in the case of a particular service provided that it does not harm the competitive situation between Carriers. It is recognized that rates for a Telecommunication Service based on the principle that the territory served by a Carrier is treated as a unit, has the fundamental advantage of allowing flexibility in the design of rate schedules which will result in more people having better service made available to them at reasonable prices because inordinate disparities due to terrain, location, population density, etc., are averaged out.

The application of these principles should not preclude special rates under certain circumstances. For example special rates should be recognized for:-

- 1) Inter-carrier rentals.
- 2) Large single user networks where the user may make a capital contribution towards the provision of service or is prepared to enter into a long term contract.

- 3) Market Testing, e.g., provisional rates for new developments.
- b) The Connection of Customer-Owned Equipment or Systems on an Equitable Basis
- This subject is contained in Study 8 (b) and will be discussed in detail there.
- Connection of customer-provided terminal equipment to Telecommunications Carrier systems should be allowed.
- Connection of customer-provided systems to Telecommunications Carrier Systems should not be mandatory except for service to an area which the Carrier cannot serve economically. This should not preclude interconnection by mutual consent.
- In both cases, interconnection should be provided at reasonable rates and be subject to technical approval to guard against degradation to any service provided by the Carrier.
- c) Provision of Service on Demand
- Except in cases of misuse or non-payment, a Telecommunications Carrier should be obliged to provide and continue to provide service required for any lawful purpose within the area where it generally provides such a service. Subject to the foregoing and upon application:
- service must be provided with all reasonable dispatch within the geographic area served by suitable distribution facilities -
 - where suitable distribution facilities do not exist the Carrier should be prepared to provide service if there is an effective demand. Effective demand means a demand at compensatory prices.
- d) Liability for Telecommunication Malfunction or Misuse
- A Telecommunication Carrier should undertake to make every effort to ensure the conveyance of all information with speed and accuracy. However, even with continuing advances in Telecommunications research and technology, it is not technically possible for a carrier to guarantee the perfect conveyance of information.
- Present legislation in respect of liability applicable to CN-CP is section 381 (A) of the Railway Act which, in part, empowers the Commission to determine the

extent to which the liability of a Telecommunications Carrier may be limited. The terms and conditions under which telegraph and cable messages shall be transmitted are prescribed by Order No. 49274 dated December 5, 1932 by the Board of Transport Commissioners for Canada (now succeeded by General Order T40 of the Canadian Transport Commission). These are indicated on telegraph dispatch blanks as follows:-

TERMS AND CONDITIONS UPON WHICH TELEGRAPH AND CABLE MESSAGES SHALL BE TRANSMITTED ARE PRESCRIBED BY ORDER No. 49274 DATED DECEMBER 5th, 1932, OF THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA, AND PUBLISHED IN THE CANADA GAZETTE.

It is agreed between the sender of the message, on the face of this form and this Company, that said Company shall not be liable for damages arising from failure to transmit or deliver, or for any error in the transmission or delivery of any un-repeated telegram, whether happening from negligence of its servants or otherwise, or for delays from interruptions in the working in its lines, for errors in cypher or obscure messages, or for errors from illegible writing, beyond the amount received for sending the same.

To guard against errors, the Company will repeat back any telegram for an extra payment of one-half the regular rate, and in that case the Company shall be liable for damages, suffered by the sender to an extent not exceeding \$200., due to the negligence of the Company in the transmission or delivery of the telegram.

Correctness in the transmission and delivery of messages can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages viz.: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance.

This Company shall not be liable for the act or omission of any other Company, but will endeavor to forward the telegram by any other Telegraph Company necessary to reaching its destination, but only as the agent of the sender and without liability therefor. The Company shall not be responsible for messages until the same are presented and accepted at one of its transmitting offices; if a message is sent to such office by one of the Company's messengers he acts for that purpose as the sender's agent; if by telephone the person receiving the message acts therein as agent of the sender, being authorized to assent to these conditions for the sender. This Company shall not be liable in any case for damages, unless the same be claimed, in writing, within sixty days after receipt of the telegram for transmission.

No employee of the Company shall vary the foregoing.

Generally the same kind of protection as exists respecting telegraph communications should be available to the Telecommunication Carrier to preclude the Carrier from facing unlimited liability and the user higher tolls. Insofar as the passage of Bill C-11 amending the Railway Act brings all Telecommunications Services under the control of

the Canadian Transport Commission, the CTC should approve the various limitations of liability found within published tariffs. In addition, Telecommunications Carriers should have, in respect of all regulated private line services, the protection as provided for in the general regulations governing the furnishing of telephone service and equipment by Bell Canada.

The foregoing limitations do not represent an exhaustive enumeration of the areas in respect of which a Telecommunications Carrier should receive protection - changing technology, user requirements and the resourcefulness of litigants necessitate continuous review of the Carrier's position.

It is fundamental to the deliberations of the Telecommission on the question of carrier liability that the protection recognized and granted by the CTC to carriers of telegraph and telephone services be recognized and granted by any Act of Parliament superseding existing legislation.

Existing tariffs applicable to private line services contain various terms and conditions affecting the supply of Telecommunications Services to users. It is important that the Telecommission accept the principle that where a Telecommunications Carrier breach its duty to a user, the liability attendant on such breach be limited to a refund of the charges made for the service in question.

Since it is impossible to assess the real value on every message lost, delayed or mis-stated, unless such value is agreed upon before the act of transmission or before the initiation of Telecommunication Service, a Carrier should not be required to accept liability beyond a refund of tolls in respect of culpable non-performance of its function. Where the Carrier is required to insure the value of a message or service by prior agreement, the carrier must be entitled to charge an additional toll.

e) Legal Right of Users to Privacy

A Telecommunication Carrier should recognize the right of all users of its Telecommunication Services to privacy as well as its obligation to continue to take reasonable precautions to protect this right.

In accordance with the Telegraph Act, all employees in the performance of their duties, who have access to information being conveyed on telegraph facilities, are required to take an oath of secrecy. Nevertheless there can be no absolute guarantee of privacy. In addition, all telecommunication facilities can be tapped or read by any person possessing the proper skills and equipment.

"Reasonable precautions" taken to protect the privacy of the user may be more effective in some cases than in others. Where special measures are undertaken special technology and techniques, not normally used for commercial applications, are involved at increased expense and increased costs to the user.

The Telecommission is urged to recommend enactment of remedial legislation for situations where information may be passed by one carrier to another carrier before the act of inter-connection actually occurs. All personnel of the receiving carrier, having access to the information at the point of inter-connection, should be obliged to take an oath of secrecy.

f) Quality of Service and Service Continuity

A Telecommunications Carrier should provide service having satisfactory quality and continuity characteristics. These characteristics should be relatively uniform under substantially similar conditions.

The expectations of the public with respect to quality and continuity of service are continuously rising. A Carrier should plan the development of its system and operations to meet these expectations.

A Carrier should set understandable performance objectives for its system, which are just and reasonable to the Carrier, the customer and the regulator. The achievement of these should be reviewed periodically with its regulatory authority.

(2) Rights

a) Franchise

Persons seeking to perform the Telecommunications Carrier function, as a condition precedent to the performance of such a function, should be enfranchised by a Federal

Communications authority where Parliament has jurisdiction over such persons by virtue of the provisions of the Canadian Constitution. In respect of existing Telecommunications Carriers a franchise should confer the right to operate as a Telecommunications Carrier in accordance with corporate powers possessed and exercised by the applicant as on December 31st, 1969. Subject to the foregoing a franchise should confer the right to operate as a Telecommunications Carrier upon such terms and conditions as Parliament may prescribe.

The criteria used by the Federal Communications authority in approving or disapproving a franchise application should be clearly set out in legislation and should take into account:

- 1) public interest and need including economic and technical factors
- 2) ability of existing Telecommunications Carriers to properly satisfy interest and need.

A person licensed under the Broadcasting Act (1967-68 Statutes of Canada, chapter 25), who distributes radio or television signals for reception by the public, either by air or through cable distribution systems, shall not, insofar as such person is so engaged, be deemed to be a Telecommunications Carrier.

The number of competing carrier groups for the present should continue to be the existing carrier, namely the telephone system and CN-CP to achieve the best compromise between economies of scale and competition.

b) Right-of-Way

Subject to protection of the public interest and with due regard for safety, aesthetics, co-ordination with other utilities, cost, use of modern techniques and continuity of service, a Telecommunications Carrier should have the right to the necessary rights-of-way, space in buildings and rights-of-access for the construction, maintenance and removal of structures, poles, conduits, plant, wiring, circuits, instruments, equipment, fixtures and facilities.

In addition Telecommunications Carriers should have the right to frequency assignments in acceptable portions of the radio spectrum, subject only to technical considerations, and suitable co-ordination.

c) Right of Access to Capital Markets

A Telecommunications Carrier should have the responsibility of determining the amounts, terms and conditions of capital to be raised. The intimate and continuing knowledge possessed by the Carrier of its own business and of the capital markets is essential in determining sound financial policies which will provide adequate protection of its credit standing.

The amount of capital which can be raised on reasonable terms, given prevailing market conditions, is mainly dependent upon the earnings prospects of the Carrier which are, in turn, dependent upon the demand for the Carrier's services and the rates which it can charge.

d) Right to Plan Construction

The obligation of a Telecommunications Carrier to meet and anticipate the present and future service needs of its customers carries with it the responsibility of the Carrier to plan and implement the construction program best suited to meet these needs. Since the Carrier must assume the risk for capital investments, planning must be under its complete control. A Carrier should keep its regulatory authority informed of its broad, current and future construction plans.

e) Right to Establish Rates

It is understood that "rates" will be discussed in detail in another Study.

Subject to the approval of regulated rates by the appropriate authority, a Telecommunications Carrier should have the right to establish the rate structure for its services. The services that the Carrier provides are closely interrelated and the influences of cost, demand and competition, combined with utility pricing principles such as compensatory pricing, value of service, and system-wide pricing, produce a complex set of inter-dependent rate relationships.

Legislation with regard to rate regulation should set out clearly defined criteria which the regulatory authority must use in approving or disapproving the Carrier's rate structure.

Ontario Northland

HEAD OFFICE - NORTH BAY, ONTARIO

L. K. SMILEY,
Manager of Communications

123

April 7, 1970.

Mr. J. Shantora,
Department of Transport,
Legal Branch,
Ferguson Block,
Parliament Buildings,
Toronto, Ontario.

Dear Sir;

As requested, attached is one copy of a memorandum covering the Ontario Northland Transportation Commission's position with respect to Item 1(c) of the Telecommission Study.

Yours truly,

Bob Lane

for Manager.

ECP/wjw
Attach.

Telecommission Study 1 (c)

Concept of a Telecommunications Carrier

- A. Telecommunications is the emission, conveyance, or reception of information by, in whole or in part, electro-magnetic waves.
- B. Telecommunications Service is a service whose predominant purpose is the emission, conveyance, or reception of information by, in whole or in part, electro-magnetic waves.
- C. Telecommunications Carrier Function is the provision of telecommunications service to others for compensation.

D. Telecommunications Carrier Obligations and Rights

(1) Obligations to Users

a) An Equitable System of Rates

When a telecommunications carrier is obliged to furnish certain telecommunications services throughout its operating territory, the rates charged for such services should be just and reasonable. Such rates should not be unjustly discriminatory and, under substantially similar circumstances and conditions, similar rates should be charged to all persons.

Rates for such services should be based upon the principle that the territory served by a carrier is treated as a unit. The fundamental advantage of this method is that the flexibility it provides in the design of rate schedules will result in more people having better service made available to them at reasonable prices because inordinate disparities due to terrain, location, population density, etc., tend to be averaged out.

Where services are jointly provided by more than one carrier through two or more adjacent operating areas, it is desirable that the rates for each service be uniform e.g. long distance service. It follows then that the revenue derived from the total service should be shared amongst the carriers who provide the service in proportion to their respective costs of providing the service.

b) The Connection of Customer-Owned Equipment or Systems on an Equitable Basis

The obligation of a telecommunications carrier to permit connection of customer-owned equipment or systems to the carrier's system should be limited to situations where such connection is required in the public interest. Paramount considerations which must be assessed by the carrier are:

- the economic effects of such connections on the carrier and ultimately on its customers.
- the risk of degradation of the quality of service to the public through technical pollution of the carrier's system.

c) Provision of Telecommunications Services on Demand

There are two basic principles which should govern a telecommunications carrier's obligations with respect to providing service.

1. When a carrier is obliged to furnish certain telecommunications services throughout its operating territory, it should be obliged to provide such services on a just and reasonable basis and without undue delay.
2. All other telecommunications services normally provided by the carrier should be provided as promptly as the availability of suitable equipment and facilities permit.

In cases of misuse, non-payment or where an unreasonable financial burden would be placed on the carrier, these principles would not apply.

d) Liability for Telecommunications Malfunction or Misuse

A telecommunications carrier should undertake to make every effort to ensure the conveyance of all information with speed and accuracy. However, even with continuing advances in telecommunications research and technology, it is not technically possible for a carrier to guarantee the perfect transmission of information.

e) Legal Right of User to Privacy

A telecommunications carrier should recognize the right of all users of its telecommunications facilities to privacy as well as its obligation to continue to take reasonable precautions to protect this right.

It is not considered technically possible to guarantee complete privacy to the users.

f) Quality of Service and Service Continuity

A telecommunications carrier should set and maintain current, comprehensive, understandable performance objectives which are just and reasonable to the carrier, its customers and the regulatory body concerned.

(2) The Rights of a Telecommunications Carrier

a) Franchise

A telecommunications carrier's franchise should specify clearly the boundaries of the area served and the types of service to be provided.

Where adjacent franchised areas are regulated by different bodies, there should be close co-ordination between the respective bodies in the establishment of regulatory policy.

The carriers should have a clearly identified recourse procedure for the settlement of disputes concerning -

- 1) duplication of services
- 2) erosion of operating areas
- 3) changes in boundaries caused by changes in types of service or rates
- 4) division of revenues earned on "through" services
- 5) establishment of service to new areas
- 6) establishment of rates for new services

b) Right-of-Way

Subject to protection of the public interest and with due regard for safety, aesthetics, co-ordination with other utilities, cost, use of modern techniques and continuity of service, a telecommunications carrier should have the right to the necessary right-of-way, space in buildings and rights-of access for the construction and maintenance of the necessary structures, poles, conduits, plant, wiring, circuits, instruments, equipment, fixtures and facilities.

Right to the use of portions of the radio spectrum is essential to the carrier. This should include the right of access to sufficient suitable radio spectrum required to meet long term service requirements and should be subject only to technical limitations and long term changes in technology.

c) Right of Access to Capital Markets

A telecommunications carrier should have the responsibility of determining the amounts, terms and conditions of capital to be raised. The intimate and continuing knowledge possessed by the carrier of its own business and of the capital markets is essential in determining sound financial policies which will provide adequate protection of its credit standing.

The amount of capital which can be raised on reasonable terms, given prevailing market conditions, is mainly dependent upon the earnings prospects of the carrier which are, in turn, dependent upon the demand for the carrier's services and the rates which it can charge.

d) Right to Plan Construction

The telecommunications carrier should assume the responsibility for planning and implementing a construction program best suited to meet the existing and forecasted service requirements of its customers and consistent with its obligations.

e) Right to Establish Rates

Subject to the approval of regulated rates by the appropriate authority, a telecommunications carrier should have the right to establish the overall rate structure for its services. The services that the carrier provides are closely interrelated and the influences of cost, demand and competition, combined with utility pricing principles such as value of service and system-wide pricing, produce a complex set of interdependent rate relationships.

Legislation with regard to rate regulation should set out clearly defined criteria which the regulatory authority must use in approving or disapproving the carrier's rate structure.

Telesat Canada
333 River Road
Vanier,
Ottawa 7, Ontario
(613) 746-5937

Office of the Vice President
Administration

TELESAT CANADA

TELECOMMISSION STUDY 1 (c)

LEGAL CONSIDERATIONS: CONCEPT OF A
TELECOMMUNICATIONS CARRIER

Using the terms of reference for study 1 (c) as a guide, we will consider both the present legal position and proposed future status of telecommunications carriers.

Terms of Reference - APPROVED

1 (c) Concept of a telecommunications carrier.

Employing the following headings, we shall postulate what telecommunications carrier should be:

- A. Definition of Telecommunications
- B. Definition of Telecommunications Service
- C. Definition of Telecommunications carrier Function
- D. Definition of Telecommunications carrier obligations and rights.

(1) Obligations to Users

- a) Equitable System of Rates
- b) Equitable connection of customer owned equipment and systems,
- c) Provision of service on demand,
- d) Liability for telecommunication malfunction or misuse,
- e) Legal right of user to privacy,
- f) Quality of service and continuity.

(2) Rights

- a) Franchise,
- b) Right of way,

- c) Right of access to capital market,
- d) Right to plan construction,
- e) Right to establish rates.

DEFINITIONS

A.

DEFINITION OF TELECOMMUNICATIONS

Telesat is satisfied with the definition of telecommunications as found in the Radio Act, the Canadian Overseas Telecommunications Act, the Interpretation Act and the Telesat Canada Act; i.e.,

"Telecommunications" means any transmission, emission or reception of signs, signals, writing, images, or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system."

This definition would, however, be technically more comprehensive if the words "or acoustical" were added after the word "electromagnetic" in the last line of the definition. This is suggested as there is a possibility that a Telecommunications system could make use of acoustical waves as a mode of transmission in some restricted part of the system.

The second definition is:

"Telecommunications is the emmission, conveyance or reception of information by, in whole or in part, electromagnetic waves."

We regard this second definition as weak in that it does not adequately define "information". It should be recognized that the scope of the second definition depends on the interpretation of "information".

B. DEFINITION OF TELECOMMUNICATIONS SERVICE

Since Telesat finds the first definition preferable, it suggests the definition of Telecommunications Service should be:

"Telecommunications Service is a service the predominant purpose of which is the transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic or acoustical system."

C. DEFINITION OF TELECOMMUNICATIONS CARRIER FUNCTION

The following definition is satisfactory to
Telesat:

"The function of a telecommunications carrier
is the provision for others of telecommunication
service, including any function incidental
thereto, by means of any appropriate facility,
apparatus, method or instrumentation."

In any consideration of proposed legislation
respecting telecommunications, telecommunications service and the
telecommunications carrier function, it is essential to consider
the position of the owners and operators of meteorological,
navigational and earth resources satellites, and other types of
satellite systems.

D. DEFINITION OF TELECOMMUNICATIONS CARRIER OBLIGATIONS AND RIGHTS

(1) a) EQUITABLE SYSTEM OF RATES

It is understood that the discussion of rate structure will be reserved for Telecommission Study group 7 (a).

b) Connection of Customer Equipment, etc., to be considered under another telecommission study.

(1) c)

SERVICE ON DEMAND

Like other firms in the telecommunications industry, Telesat Canada recognizes, in principle, an implicit obligation to provide on demand and "on a commercial basis, (satellite) telecommunications services between locations in Canada." ¹

In the field of long distance telecommunications, service must be related to economic feasibility. Furthermore, government regulation should always take into consideration the orderly expansion of communications facilities in the public interest.

However, it should be recognized that the economic feasibility of satellite service varies depending on whether it involves the launching of another satellite or simply the construction of additional ground facilities, in order to provide such service. The capital investment required is of a very different order of magnitude.

¹ 17-18 Elizabeth II, Chapter 51 - Telesat Canada Act, Section 5, Subsection (1)

(1) d)

LIABILITY FOR TELECOMMUNICATION MALFUNCTION
OR MISUSE

Telesat Canada recognizes, as do the other common carriers the principle of limited liability. In the event of a malfunction of any of its facilities, the liability of Telesat Canada for such malfunction should only extend to persons with whom Telesat has an express contractual relationship. Recognizing the existing state of technology in the satellite communications industry, there will be a minimum period of interruption for which Telesat Canada would not be liable. In respect of an interruption of service for a time beyond the minimum period specified, Telesat will not be liable for an amount greater than the rentals payable for the period during which the interruption occurred. Telesat shall not be liable for any misuse of its facilities.

(1) e)

LEGAL RIGHT OF USER TO PRIVACY

Telesat Canada respects the rights of its potential users to privacy and will take every reasonable precaution to ensure that their privacy will be respected. Telesat Canada subscribes to the principle that those persons handling or having access to the transmission of confidential material should be required to take an oath of secrecy. To guarantee absolute privacy in light of the human factor and the increasing complexity in electronic eavesdropping devices would be unrealistic.

Telesat Canada accepts the principle, as stated by other carriers; that "a telecommunications carrier should not have the right to control the content nor influence the meaning of information transmitted by it unless specifically instructed otherwise by the originator or author of the information."

(1) f) QUALITY OF SERVICE AND CONTINUITY

Telesat Canada believes that telecommunication carriers should provide consistent and high quality service and should endeavour to utilize technological innovations as soon as economically feasible. Contracts with the users will set certain performance standards.

It is essential to point out that the quality and continuity of the provision of service through the Telesat system is limited by the reliability and satisfactory functioning of the other segments of the system providing the complete service.

(2) RIGHTSa) Franchise

The franchise of a common carrier is contained in its incorporating charter; for Telesat this is the Telesat Canada Act. Such a franchise is a special privilege granted by the government to undertake a telecommunications enterprise.

The franchise of Telesat Canada is partially described in subsection 1 of section 5 of the Act:

"5 (1) The objects of the company are to establish satellite telecommunication systems providing, on a commercial basis, telecommunication services between locations in Canada."

(2) b) RIGHT-OF-WAY

Telesat has the power, granted by section 35 of its incorporation act, to expropriate land necessary for the domestic communications system subject to the provisions of the Expropriation Act and the consent of the Governor-in-Council.

Telesat recognizes the importance of government regulation and international co-ordination respecting apportionment of the frequency spectrum and orbit positions in space.

(2) c)

RIGHT OF ACCESS TO CAPITAL MARKET

Telesat Canada's right of access to the capital market is governed by the incorporating act² which provides for the issuance of shares and the limitation on the authorized capital.² Apart from the existing limitations, it is Telesat's position that the corporation's requirements for capital resources should be governed by the decisions of its shareholders. As the Government of Canada will be a substantial shareholder in Telesat Canada, it will have the opportunity to express its views in this capacity.

Controls by government regulatory bodies should be exercised early to ensure an efficient utilization of capital resources.

² 17-18 Elizabeth II, Chapter 51 - Telesat Canada Act, Section 10.

(2) d) RIGHT TO PLAN CONSTRUCTION

Telesat differs from the other carriers in that certain aspects of its construction program are subject to controls specified in the incorporating statute. Telesat's objects, requiring operation on a commercial basis and optimization of Canadian participation in design, engineering and manufacturing, are compatible provided Canadian industry is technologically capable and competitive.

The right of any carrier to plan construction should be permitted to be exercised only to the extent that it does not lead to a disorderly or wasteful duplication of facilities.

(2) e) RIGHT TO ESTABLISH RATES

It is understood that the question of rates is to be considered under another Telecommission Study.

CONCEPT OF A TELECOMMUNICATIONS CARRIER

Telecommission Study 1(c)

Submitted by:
The Trans-Canada Telephone System

April 1970

TELECOMMISSION

STUDY 1(c)

CONCEPT OF A TELECOMMUNICATIONS CARRIER

TERMS OF REFERENCE

Employing the following headings, we shall postulate what a telecommunications carrier should be:

- A. Definition of Telecommunications
 - B. Definition of Telecommunications Service
 - C. Definition of Telecommunications Carrier Function
 - D. Definition of Telecommunications Carrier Obligations and Rights.
 - (1) Obligations to Users
 - * a) Equitable system of rates.
 - * b) Equitable connection of customer owned equipment and systems.
 - c) Provision of service on demand.
 - d) Liability for telecommunication malfunction or misuse.
 - * e) Legal right of user to privacy.
 - f) Quality of service and continuity.
 - (2) Rights
 - a) Franchise.
 - b) Right of way.
 - c) Right of access to capital market.
 - d) Right to plan construction.
 - * e) Right to establish rates.
- * These elements are the specific subject of other Telecommission Studies.

Telecommission Study 1(c)
Concept of a Telecommunications Carrier

A. Definition of Telecommunications

Telecommunications is the emission, conveyance, or reception of information by, in whole or in part, electro-magnetic waves.

B. Definition of Telecommunications Service

A telecommunications service is a service whose predominant purpose is the emission, conveyance, or reception of information by, in whole or in part, electro-magnetic waves.

C. Definition of Telecommunications Carrier Function

The function of a telecommunications carrier is the provision, for compensation, of telecommunications service to others, including any function incidental thereto, by means of any appropriate facility, apparatus or instrumentality. Therefore a telecommunications carrier is a person who provides, for compensation, telecommunications service to others, including any function incidental thereto, by means of any appropriate facility, apparatus or instrumentality.

D. Definition of Telecommunications Carrier Obligations and Rights

A telecommunications carrier is included in the group of enterprises known as public utilities. This group also includes transportation, power, water, gas, etc. These public utilities have a number of similar characteristics which generally include:

1. Being subject to government regulation.

2. Supplying some of the wants most fundamental to common living.
3. Using common facilities to provide a product or service to customers.
4. The use of an expensive physical network configuration.
5. Monopoly or oligopoly of utilities providing a specific product or service in any one place.

The general relationship of these characteristics is evident in the following description of obligations and rights.

This section is not intended to be a list of all the rights and obligations of a telecommunications carrier. Items (1) a to (1) f) and (2) a) to (2) e) deal with certain important aspects of a telecommunications carrier's business.

(1) Obligations to Users

a) Equitable system of rates

It is understood that "rates" will be discussed in detail in a study of "Considerations Relating to the Pricing of Telecommunications Services" to be submitted in Telecommission Study 7 (ab).

In general, the rates charged for telecommunications services should be just and reasonable. Such rates should not be unjustly discriminatory and, under substantially similar circumstances and conditions, similar rates should be charged to all persons.

In particular, when in accordance with the provisions of its charter or other enabling legislation, a telecommunications carrier is obliged to furnish a telecommunications service, long experience has shown that rates for such a service should be based upon the principle that the territory served by a carrier

is treated as a unit. The fundamental advantage of this method is that the flexibility it provides in the design of rate schedules will result in more people having better service made available to them at reasonable prices because inordinate disparities due to terrain, location, population density, etc., are averaged out.

b) Equitable connection of customer owned equipment and systems

This subject is contained in Telecommission Study 8(b) and will be discussed in detail there.

A telecommunications carrier should permit connection of customer-owned and/or customer-leased equipment or systems to the carrier's system where such connection is required in the public interest. Paramount considerations which must govern such interconnection are:

- the economic effects of such connections on the carrier and ultimately on its customers.
- the risk of degradation of the quality of service to the public through technical pollution of the carrier's system.

c) Provision of service on demand

There are two basic principles which should govern a telecommunications carrier's obligations with respect to providing service.

1. When, in accordance with the provision of its charter or other enabling legislation, a carrier is obliged to furnish certain telecommunications services throughout its territory, it should also be obliged to provide such services on a just and reasonable basis and without undue delay.

2. All other telecommunications services normally provided by the carrier should be provided as promptly as the availability of suitable equipment and facilities permit.

In cases of misuse, non-payment or where an unreasonable financial burden would be placed on the carrier, these principles would not apply.

d) Liability for telecommunications malfunction or misuse

A telecommunications carrier should undertake to make every effort to ensure the conveyance of all information with speed and accuracy. However, even with continuing advances in telecommunications research and technology, it is not technically possible for a carrier to guarantee the perfect conveyance of information. Limitation of liability arising from malfunction of a telecommunications carrier's equipment, from misuse of its service or from any other cause has long been legally authorized and should be continued.

e) Legal right of user to privacy

A telecommunications carrier should recognize the right of all users of its telecommunications facilities to privacy as well as its obligation to continue to take reasonable precautions to protect this right.

A telecommunications carrier should not have the right to control the content nor influence the meaning of any information conveyed by it unless specifically instructed otherwise by the customer.

It is not technically possible to guarantee users against eavesdropping, particularly in view of the increasing sophistication of electronic devices.

f) Quality of service and continuity

A telecommunications carrier should provide service having satisfactory quality and continuity characteristics. These characteristics should be relatively uniform under substantially similar conditions.

The expectations of the public with respect to quality and continuity of service are continuously rising. A carrier should plan the development of its system and operations to meet these expectations.

A carrier should set understandable performance objectives for its system which are just and reasonable to the carrier, its customers and its regulatory authority. The achievement of these objectives should be reviewed periodically with the regulatory authority.

(2) Rights

a) Franchise

A telecommunications carrier should require no franchise other than the right to carry on its business in accordance with the provisions of its charter or other enabling legislation.

A person licensed under the Broadcasting Act (16-17 Elizabeth II Chapter 25) who distributes radio or television signals for reception by the public, either by air or through cable distribution systems, shall not, insofar as such person is so engaged, be deemed to be a telecommunications carrier.

b) Right of way

Subject to protection of the public interest and with due regard for safety, aesthetics, co-ordination with other utilities, cost, use of modern techniques and continuity of service, a telecommunications carrier should have the right to the necessary rights-of-way, space in buildings and rights-of-access for the construction and maintenance and removal of the necessary structures, poles, conduits, plant, wiring, circuits, instruments, equipment, fixtures and facilities.

In addition, a telecommunications carrier should have the right to frequency assignments in approved portions of the spectrum, subject only to technical considerations and suitable coordination.

c) Right of access to capital market

A telecommunications carrier should have the responsibility of determining the amounts, terms and conditions of capital to be raised. The intimate and continuing knowledge possessed by the carrier of its own business and of the capital markets is essential in determining sound financial policies which will provide adequate protection of its credit standing.

The amount of capital which can be raised on reasonable terms, given prevailing market conditions, is mainly dependent upon the earnings prospects of the carrier which are, in turn, dependent upon the demand for the carrier's services and the rates which it can charge.

d) Right to plan construction

The obligation of a telecommunications carrier to meet and anticipate the present and future service needs of its customers carries with it the responsibility of the carrier to plan and implement the construction program best suited to meet these needs. In addition, it is the carrier who assumes the financial risk, therefore the planning responsibility rightfully belongs with the carrier.

The ability to assess the many factors, including regional differences, which influence such planning results from the day-to-day experience gained in the management of the business. A carrier should keep its regulatory authority informed of its broad current and future construction plans.

e) Right to establish rates

It is understood that "rates" will be discussed in detail in a study of "Considerations Relating to the Pricing of Telecommunications Services" to be submitted in Telecommission Study 7 (ab).

Subject to the approval of regulated rates by the appropriate authority, a telecommunications carrier should have the right to establish the overall rate structure for its service. The services that the carrier provides are closely interrelated and the influences of cost, demand and competition, combined with utility pricing principles such as value of service and system-wide pricing, produce a complex set of interdependent rate relationships.

Legislation with regard to rate regulation should set out clearly defined criteria which the regulatory authority must use in approving or disapproving the carrier's rate structure.

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